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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

UNIROYAL, INC.,

Petitioner,

v.

ALTA CHRAPLIWY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Does Section 706(k) of Title VII of the Civil Rights Act of 1964 authorize an award of attorney's fees for participation in court and administrative proceedings which are not mandated or required by the enforcement scheme of Title VII under this Court's holding in *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54 (1980)?

May plaintiffs' attorneys be awarded fees in a Title VII proceeding for their participation in court proceedings which are not a part of the enforcement scheme of Title VII and in which either the Title VII plaintiffs or defendant was not even a party?

Whether the Seventh Circuit erred by making an independent finding of fact as to the appropriate hourly rate to be used in computing a reasonable attorney's fee under Section 706(k) contrary to the "clearly erroneous" standard set forth in F.R.C.P. 52(a)?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Uniroyal, Inc. (hereinafter referred to as "Uniroyal"),[1] respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on February 16, 1982.

OPINIONS BELOW

The Opinion of the Court of Appeals dated February 16, 1982, is not officially reported, but is unofficially reported at 28 FEP Cases 19. A copy is appended hereto as

[1] Pursuant to Rule 28.1 of the Rules of the Court, Petitioner hereby states that it has no parent company, subsidiaries (except wholly owned subsidiaries) or affiliates.

Appendix A. The Opinion of the District Court for the Northern District of Indiana, South Bend Division, dated March 6, 1981, is reported at 509 F. Supp. 442. A copy is appended hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was dated and entered February 16, 1982 (Appendix C). Uniroyal's petition for rehearing and suggestion for rehearing *en banc* was denied April 13, 1982 (Appendix D). This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTORY PROVISION INVOLVED

The statutory provision involved is Title VII of the Civil Rights Act of 1964, as amended, (hereinafter referred to as "Title VII") 42 U.S.C. § 2000e, *et seq.*, and specifically Section 706(k) thereof (42 U.S.C. § 2000e-5(k)) which provides as follows:

> In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

STATEMENT OF THE CASE

This case raises questions of significance regarding the nature and type of legal proceedings for which attorneys' fees may be awarded under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* within the meaning of this Court's decisions in *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54 (1980), and *Alyeska Pipe-*

line Service Co. v. *Wilderness Society*, 421 U.S. 240 (1975). Moreover, this case concerns the proper standards and criteria which should govern a court of appeals in determining whether a district court abused its discretion in setting an appropriate hourly rate to be used in computing a "reasonable attorney's fee" under Section 706(k) of Title VII.

This is a class action sex discrimination case filed in 1972 in District Court in South Bend, Indiana by female workers who were employed by Uniroyal at its production facility in Mishawaka, Indiana. *Chrapliwy, et al.* v. *Uniroyal, Inc.*, Case No. 72 S 243 (N.D. Ind. 1972) (hereinafter *"Chrapliwy"*). In 1974, the District Court granted the plaintiffs' motion for partial summary judgment on issues of liability. Thereafter the proceedings were delayed due to the death of the presiding district court judge and the resulting vacancy in the district court. Following the judge's death, plaintiffs almost immediately requested the district's chief judge to expedite the case. Plaintiffs were advised that everything humanly possible would be done in this regard despite a heavy backlog of priority criminal cases and a critical shortage of judges in the district.

Still impatient with the delay, in 1975 plaintiffs diverted their attention away from *Chrapliwy* and brought suit against the Secretaries of Labor, Defense and Interior seeking to have Uniroyal debarred from its status as a federal contractor under Executive Order 11246.[2] *Chrapliwy* v. *Dunlop*, Case No. 75-1705 (D.D.C. 1975) (hereinafter *"Dunlop"*). Although plaintiffs made extensive efforts to join

[2] Executive Order 11246 (30 F.R. 12319) prohibits federal contractors from discriminating against employees on the basis of sex, race and other impermissible grounds. A contractor can be debarred from its contracts and declared ineligible for future government contracts in the event of noncompliance with the Order.

Uniroyal as a defendant in this proceeding, Judge Pratt of the District Court for the District of Columbia ruled that Uniroyal could not be made a party inasmuch as the Executive Order created no private action against an employer by an employee.

After plaintiffs and the federal government entered into a stipulation whereby the government agreed to conduct a compliance review of Uniroyal under the Executive Order, the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) commenced an administrative action against Uniroyal to debar it as a federal contractor and cancel its existing contracts. *OFCCP* v. *Uniroyal, Inc.*, Case No. 1977-1. Plaintiffs were permitted to intervene in the OFCCP action in their capacity as "interested persons" under the Executive Order.

Uniroyal challenged the validity of the OFCCP's rules and regulations concerning administrative discovery and obtained a temporary restraining order from the District Court which was subsequently dissolved on the grounds that Uniroyal had not exhausted its administrative remedies. *See Uniroyal, Inc.* v. *Marshall*, __ F. Supp. __, 20 FEP Cases 477 (N.D. Ind. 1977) (hereinafter "*Marshall I*"). Plaintiffs were never a party to this proceeding, although plaintiffs' counsel sought compensation for "monitoring" this proceeding.

Forced to contest the validity of the discovery regulations through the administrative process, Uniroyal refused to comply with the OFCCP's discovery requests, and an administrative hearing was held to consider the government's motions to debar Uniroyal for its refusal to comply with discovery. The government's case was presented by a team of five attorneys. Plaintiffs' counsel attended the six days of hearing, but did not present witnesses on their

own behalf or cross-examine witnesses presented by the government or Uniroyal.[3]

Following the Administrative Law Judge's issuance of an order in 1978 recommending Uniroyal's debarment based upon its failure to comply with discovery, Uniroyal filed timely exceptions to the recommended decision with the Secretary of Labor. While the case was under advisement, plaintiffs filed another lawsuit against the Secretary of Labor attempting to force him to issue a Final Administrative Order adopting the recommended decision of the Administrative Law Judge. *Chrapliwy* v. *Marshall*, Case No. 79-1647 (D.D.C. 1979). Once again, Uniroyal was not a party to nor was it involved in this proceeding.

The *Chrapliwy* Title VII action was ultimately settled leaving only the issue of attorneys' fees to be decided by the District Court. Accordingly, plaintiffs made application to the District Court seeking fees in the amount of $4,658,510. After full briefing by the parties and a hearing on the fee issue, the District Court awarded plaintiffs a fee of $833,679. This amount represented a "lodestar" fee of $583,679 based on the compensable hours multiplied by the allowable hourly rates, a $200,000 bonus for the quality of representation and $50,000 for the risks of litigation.[4]

Relying on this Court's decision in *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54 (1980), the District Court

[3] Plaintiffs' counsel filed a motion in the administrative proceeding seeking to have Uniroyal debarred based on alleged substantive violations of the Executive Order, but the Administrative Law Judge, the Secretary of Labor and the reviewing district court all ruled that the hearing had been limited to the procedural discovery issue. *See Uniroyal, Inc.* v. *Marshall*, 482 F. Supp. 364, 375-376 (D.D.C. 1979) (hereinafter "*Marshall II*").

[4] Uniroyal has already paid plaintiffs' counsel the lodestar fee and the $50,000 fee for the risk of litigation.

rejected plaintiffs' claims for attorneys' fees for participation in the various non-Title VII lawsuits and administrative proceeding described above, specifically *Dunlop, Marshall I, Marshall II, Chrapliwy* v. *Marshall,* and the OFCCP administrative debarment proceeding. The District Court held:

> Several reasons dictate this decision, but, most importantly, the remedies of Title VII did not require nor encourage the plaintiffs to seek Uniroyal's contract debarment. The Title VII remedy existed at all times, and could have been utilized to bring Uniroyal to a settlement or judgment. In this case, the collateral proceedings may have been the proximate cause of the success achieved by the plaintiffs. Success alone, however, does not legitimize a request for fees regarding procedures that were not contemplated under Title VII's attorney's fee provisions. This is made amply clear by the wording of the attorney's fee statute and the cases which have interpreted it. Section 706(k) (42 U.S.C. § 2000e-5(k)) provides:
>
> > In an action or proceedings *under this subchapter,* the court, in its discretion, may allow the prevailing party, . . . a reasonable attorney's fee as part of the cost. (emphasis added).
>
> This section requires that the attorney's time and efforts be mandated by the Title VII statute, or by related and required procedures. The emphasized language makes it clear that the attorney's time must be within the Title VII procedure. The Executive Order utilized here cannot be transformed by legal alchemistry into such a proceeding.

Appendix at B-17-18 (emphasis in original).

The District Court also rejected plaintiffs' request for an hourly rate of $175 for their Washington, D.C. lead counsel, allowing instead a rate of $75 which was near the top of the range of hourly billing rates in the South Bend area where the case arose and was litigated.

On appeal, the Court of Appeals increased the lodestar fee nearly threefold to $1,510,768. In computing the fee award, the Court of Appeals granted attorneys' fees for participation in all three of the collateral, non-Title VII court actions and the OFCCP administrative proceedings and created an entirely new standard for determining the scope of activities for which attorneys' fees can be awarded under Title VII. Under the court's test:

> Section 706(k) should be interpreted as allowing attorneys' fees to the prevailing plaintiffs for services which contribute to the ultimate termination of the Title VII action.[5]

The Court of Appeals also reversed the District Court on the issue of what constitutes a reasonable hourly billing rate, allowing plaintiffs' the full $175 rate requested for lead counsel. The Court first acknowledged that "a judge is not required to accept an attorney's valuation of his own time. A judge may well approach high rates with skepticism, and he may exercise some discretion in lowering such rates."[6] However, the Court then went on to find that the District Court had "erred as a matter of law in limiting the hourly rates to local rates in the South Bend area,"[7] even though the District Court had found that the "reasonable attorney's fee" provided by the statute required a "balancing" of requested rates and local billing rates.

The Court of Appeals then remanded the case to the District Court solely for reconsideration of the $200,000 bonus for quality of representation in light of the increased lodestar fee award.

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[5] Appendix at A-13.

[6] Appendix at A-13.

[7] Appendix at A-14.

REASONS THE WRIT SHOULD BE GRANTED

The decision of the Court of Appeals, if left standing, effectively eliminates the limitation set forth in Section 706(k) that attorneys' fees are only available under Title VII for work performed in an action or proceedings "under this subchapter." If carried to its logical extreme, the decision holds that counsel may be compensated for any activities, whether brought in a legal forum or elsewhere, if such actions contribute to an employer's decision to settle a Title VII suit.

This result conflicts with the general American rule that, absent express statutory authorization, each party pays its own attorneys' fees, *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), and represents an unwarranted broadening of this Court's decision in the *Carey* case. In *Carey*, this Court held that attorneys' fees could be awarded under Section 706(k) only for participation in proceedings which are mandated or required by the statutory scheme of Title VII. The decision below, however, is authority for an entirely different standard; *viz*, that fees will be available for any services which contribute to the ultimate termination of the Title VII action.

Finally, the decision below fundamentally misconstrues the role of the courts of appeals and the appropriate legal standard for reviewing the exercise of discretion by a district court in assigning reasonable hourly billing rates for attorneys' fee awards under Title VII.

For these reasons the writ should be granted.

ARGUMENT

I.

THE SEVENTH CIRCUIT'S TEST FOR DETERMINING COMPENSABLE HOURS IS CONTRARY TO SECTION 706(k) AS INTERPRETED BY THE COURT IN *NEW YORK GASLIGHT CLUB, INC. V. CAREY.*

Section 706(k) of Title VII provides the necessary statutory authorization for attorneys' fees as follows:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs. . . .

In *Carey,* this Court held that Section 706(k) authorizes a federal court to allow the prevailing party attorneys' fees "for legal services performed in prosecuting an employment discrimination claim in *state* administrative and judicial proceedings that Title VII requires federal claimants to invoke." 100 S. Ct. at 2027 (emphasis in original). This Court made it abundantly clear that in addition to the federal administrative and judicial procedures established by Title VII, attorneys' fees could only be awarded for work in "the state and local remedies to which complainants are required to resort," because "initial resort to state and local remedies is mandated." *Id.* at 2030, 2031. The Court concluded by again stating that attorneys' fees were only being awarded for work performed in state proceedings "to which the complainant was referred pursuant to the provisions of Title VII." *Id.* at 2034.[8]

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[8] That the holding in *Carey* is strictly limited to statutorily mandated proceedings was further emphasized by Justice Stevens in his concurring opinion:

> All that needs to be decided is whether an allowance of fees may properly cover the work performed in the administrative proceedings that were a *prerequisite* to the court action.

100 S. Ct. at 2035 (emphasis added).

The Seventh Circuit erred in awarding fees for the independent non-Title VII proceedings. *Carey* clearly precludes such fees. None of the five collateral actions was undertaken pursuant to Title VII's carefully constructed enforcement mechanism. None of these actions was either a statutorily required EEOC action or a state agency deferral proceeding, and, as the District Court observed, they "cannot be transformed by legal alchemistry into such a proceeding." Appendix at B-18.[9]

One foreseeable result of the Court of Appeals' decision will be a marked increase in unnecessary and duplicative litigation in the federal courts filed as adjuncts to already-initiated Title VII actions simply to ensure the eventual award of an expanded attorneys' fee. Indeed, under the Seventh Circuit's reasoning, any activity undertaken by counsel which contributes to the termination of the litigation will be deemed compensable activity. For example, attorneys may now logically be awarded fees for such activities as organizing and directing a consumer product boycott which forces an employer to settle a Title VII case.

The anomalous result created by the Seventh Circuit's decision is amply demonstrated by the nature of the non-Title VII collateral proceedings which the decision below brings under the umbrella of Section 706(k) in this case.

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[9] None of the collateral actions has any independent statutory basis for the awarding of attorneys' fees as required by *Alyeska*. All of the collateral actions, with the exception of the debarment proceeding, alleged jurisdiction on the basis of the Administrative Procedure Act. *Chrapliwy* v. *Marshall* and *Chrapliwy* v. *Dunlop* additionally alleged jurisdiction under the mandamus provisions of 28 U.S.C. § 1361. Neither of the cited statutory provisions contain any provision whatsoever for the recovery of attorneys' fees. Similarly, neither Executive Order 11246 nor its implementing Rules and Regulations provide for the awarding of attorneys' fees to any party.

Three years following the commencement of the instant Title VII lawsuit, plaintiffs' attorneys chose to abandon pursuit of the Title VII action and begin a series of non-Title VII court and administrative proceedings.[10] The first such proceeding, *Dunlop,* was a mandamus action against the Secretary of Labor and certain compliance agencies seeking to force them to pursue a contract debarment action against Uniroyal under the Executive Order. Despite the district court's express dismissal of Uniroyal as a defendant in this action, the decision of the Court of Appeals now requires Uniroyal to pay for approximately 1,200 hours of time devoted to this case at a rate of $175 per hour—over $200,000 in attorneys' fees for a case in which Uniroyal was not a party and from whom no relief was or could have been obtained.[11]

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[10] The Court of Appeals asserted that the plaintiffs "at all times pursued their Title VII action." Appendix at A-12. There is no factual basis for this statement, and the District Court expressly held that plaintiffs had abandoned the Title VII action. "[T]he remedies of Title VII did not require nor encourage the plaintiffs to seek Uniroyal's contract debarment. *The Title VII remedy existed at all times, and could have been utilized to bring Uniroyal to a settlement or judgment.*" Appendix at B-17 (emphasis added).

[11] The Court of Appeals for the District of Columbia in a recent case further defined the circumstances under which attorneys' hours are compensable under Section 706(k). In *National Association of Concerned Veterans* v. *Secretary of Defense,* ___ F.2d ___, 28 FEP Cases 1134, 1140 (D.C. Cir. 1982), the court held:

> Fees are not recoverable for non-productive time nor, at least in the context of Title VII and FOIA, for time expended on issues on which plaintiff did not ultimately prevail. (Citing *Copeland* v. *Marshall,* 641 F.2d 880, 892 n.18 (D.C. Cir. 1980) (*en banc*)).

Clearly the *Dunlop* case falls within the above exclusion. Not only was *Dunlop* not part of the *Chrapliwy* lawsuit, but plaintiffs did not prevail against Uniroyal.

The Court of Appeals also awarded fees to plaintiffs' attorneys for "monitoring" the proceedings in *Uniroyal, Inc.* v. *Marshall* Case No. 77-00108 (N.D. Ind. 1977) (*Marshall I*), a lawsuit challenging the validity of certain Department of Labor procedural rules relating to discovery in contract debarment administrative proceedings. Plaintiffs were not a party and did not seek to intervene in this action, and the issues involved were totally unrelated to the substantive allegations of discrimination in the Title VII *Chrapliwy* case. Certainly nothing in this lawsuit contributed in any way to the termination of the substantive Title VII claims. Accordingly, mere "monitoring" of this action cannot be considered a compensable activity.

Finally, there is the contract debarment proceeding itself and the related court cases which followed.[12] Despite the fact that the Executive Order has no provision for attorneys' fees and the federal courts unanimously agree that there is no private right of action under the Executive Order,[13] the Court of Appeals awarded attorneys' fees for the participation by plaintiffs as private litigants in such proceedings.

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[12] The Court of Appeals' apparent assumption that the debarment action dealt with the merits of substantive allegations of sex discrimination is erroneous. Appendix at A-12. The debarment action at no time concerned the issue of whether Uniroyal had violated the Executive Order on its merits. The District Court found that the entire proceeding concerned Uniroyal's failure to abide by pretrial discovery rules and regulations which it considered invalid. Appendix at B-10, citing the decision in *Uniroyal, Inc.* v. *Marshall*, 482 F. Supp. 364, 375-376 (D.D.C. 1979) (*Marshall II*).

[13] *Farkas* v. *Texas Instrument, Inc.*, 375 F.2d 629, 632-633 (5th Cir. 1967), *cert. denied*, 389 U.S. 977 (1977); *Farmer* v. *Philadelphia Electric Co.*, 329 F.2d 3 (3d Cir. 1964).

The Seventh Circuit's decision states that the fact that neither the plaintiffs nor Uniroyal were formal parties in all of the above non-Title VII proceedings is "irrelevant" (Appendix at A-13 n.15) and totally ignores the absence of a private right of action under the Executive Order. However, these factors are critical to the availability of attorneys' fees when judged against the general "American" rule that each party pay its own attorneys' fees. This Court clearly established in *Alyeska* that the express statutory authorization for fee awards is absolutely required as a prerequisite for the awarding of attorneys' fees. Awarding fees for the debarment proceedings, in which there is no provision for either a private right of action or attorneys' fees, is tantamount to creating such a right of action and is contrary to *Alyeska*.[14]

II.

THE SEVENTH CIRCUIT IMPROPERLY SUBSTITUTED ITS OWN FINDINGS OF FACT REGARDING THE HOURLY BILLING RATE ALLOWED TO PLAINTIFFS' COUNSEL.

Plaintiffs, Uniroyal and the Court of Appeals all agree that the question of attorneys' fees under Title VII is a matter properly left to the discretion of the district courts. Appendix at A-8. Moreover, the fee authorization provision

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[14] The significance of this barrier was not lost on the District Court which held that it would be improper to charge Uniroyal with attorneys' fees for the debarment proceedings absent a private right of action, adding that Title VII and the Executive Order "cannot be fused into one overarching mechanism." Appendix at B-19.

Similarly, the district court in the *Dunlop* case reasoned that Uniroyal could not be joined as a party as this would be tantamount to creating a private right of action.

of Title VII expressly recognizes the discretionary authority of the district courts in such matters.

A district court can only be vested with such discretion when it pertains to pure questions of fact. Accordingly, appellate review of discretionary attorneys' fee awards must be governed by the "clearly erroneous" standard of Rule 52(a) of the Federal Rules of Civil Procedure.[15] In *Pullman-Standard* v. *Swint*, __ U.S. __, 28 FEP Cases 1073 (1982), this Court made it explicitly clear that an appellate court may not arrive at independent findings on questions of fact free of the limitations of Rule 52. In *Swint*, the court of appeals dealt with the question of the discriminatory intent of a seniority system under Title VII, applying a test which required consideration of the totality of circumstances as well as the particular consideration of certain enumerated factors. The appellate court rejected the district court's findings of fact and substituted its own findings. Labeling the actions of the court of appeals "incredible," this Court held that a cursory reference to the controlling standard of Rule 52 would not justify or legitimatize a *de novo* review of factual issues by a reviewing court. 28 FEP Cases at 1081.

The Seventh Circuit has committed the same error as the Fifth Circuit. Although the Court of Appeals purports to be correcting a legal error (Appendix at A-14), its determination of the hourly billing rate to be awarded plaintiffs' attorneys is marked not only by the Court's independent findings of fact but also by findings not sufficiently supported by record evidence.

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[15] Rule 52(a) provides in pertinent part as follows:

> Findings of fact shall not be set aside unless clearly erroneous. . . .

Thus, for example, the Court of Appeals readily accepted the requested hourly rate of $175 per hour for plaintiffs' lead counsel without any evidence in the record that said counsel had ever received such an hourly rate. This finding was contrary to the Court's own stated standard whereby a district court may "approach high rates with skepticism" and thus lower requested billing rates in instances where "an attorney may bill at a high rate but rarely collect at that rate." Appendix at A-13, A-13 n.16.

It is also squarely in conflict with decisions of the Courts of Appeals for the Fifth Circuit and the District of Columbia. In *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714, 720 (5th Cir. 1974), the Fifth Circuit held that a party seeking attorneys' fees under Section 706(k) "has the same burden of proving entitlement to an award of attorneys' fees as he would bear the burden of proving a claim for any other money judgement." The D.C. Circuit, which has developed the most extensive standards for attorneys' fee cases,[16] elaborated on the type of factual showing which plaintiffs must make to substantiate a requested billing rate in *National Association of Concerned Veterans* v. *Secretary of Defense.* The court held:

> It is essential to this inquiry that counsel's billing practice be accurately documented. A fee applicant should be required to state the rate at which he actually billed his time in other cases during the period he was performing the services for which he seeks compensation from defendant. ***This rate is not what he would have liked to receive, or what the client paid in a single fortunate case, but what on average counsel has in fact received.***

28 FEP Cases at 1139 (emphasis added).

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[16] *See Copeland* v. *Marshall*, 641 F.2d 880 (D.C. Cir. 1980) (*en banc*).

The Seventh Circuit further stated that the "fee customarily charged for similar services in the locality where services are rendered is *doubtless relevant* even where the attorney normally practices elsewhere." Appendix at A-15-16 (emphasis added). Moreover, the Court agreed that the District Court "has discretion to question the reasonableness of an out of town attorney's billing rate" if comparable services at a lower rate are available in the locality where the case is tried. Appendix at A-16.

Having articulated these standards, the Court of Appeals usurped the District Court's discretion to determine the weight to be given local billing rates under these standards. Instead, the Court of Appeals totally ignored local billing rates and made its own independent findings of fact that the requested out-of-town rate should be allowed.

Similarly, the Court of Appeals ruled that the fee customarily charged for similar services in the locality where the attorney normally practices is also a relevant factor. Appendix at A-16. Although this was a factor not considered by the District Court, the Seventh Circuit elected to make its own determination that the rate customarily charged for similar services in the District of Columbia where plaintiffs' lead counsel resides did not require an adjustment of the requested billing rate. This finding was contrary to the only available evidence of customary rates for that locale. Reported cases cited by Uniroyal but ignored by the Court of Appeals suggest that the hourly rates awarded by the District Court were customary not only for the locality where counsel normally practiced but the locality where the case arose and was litigated. *See, e.g., Williams* v. *Boorstin*, __ F. Supp. __, 20 FEP Cases 1539, 1540 (D.D.C. 1979) (hourly rate of $75 described as "within the top range of charges for this type of work [Title VII] in this community" and awarded to counsel described by the court as "highly skilled in this field where he has had

wide experience and received growing recognition."); *Snead* v. *Harris*, __ F. Supp. __, 25 EPD ¶ 31,581 (D.D.C. 1981) (same attorney awarded hourly rate of $80 in 1981 and recognized as "an experienced and capable Title VII lawyer.").[17]

Even assuming, *arguendo*, that the Court of Appeals was correct in stating that the District Court erred as a matter of law in "limiting" the hourly rate available to plaintiffs' counsel, the Seventh Circuit nevertheless erred in making its own factual findings under the legal standard it enunciated. As this Court observed in *Swint*, it is elementary that the proper action by the reviewing court in such a case is to remand for further proceedings consistent with the legal standards established by the court of appeals.

> When an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law, the usual role is that there should be a remand for further proceedings to permit the trial court to make the missing findings. . . .
>
> Likewise, where findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the factual issue.

28 FEP Cases at 1081.

Here the factual issues which the Seventh Circuit unilaterally resolved were capable of many variations. At a minimum, the District Court should have been permitted to determine (1) the normal billing rate for comparable legal

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[17] As the court observed in *National Association of Concerned Veterans* v. *Secretary of Defense:*

> Recent fees awarded by the courts or through settlement to attorneys of comparable reputation and experience performing similar work are also useful guides in setting an appropriate rate.

28 FEP Cases at 1139.

services in Washington, D.C., and (2) whether plaintiffs' lead counsel had ever collected the requested hourly rate.

Finally, this case permits the Court to set forth the standards or criteria by which reasonable hourly rates for attorneys' fees under Title VII should be determined. This Court has never addressed this issue, although various courts of appeals have attempted to do so. *See Waters* v. *Wisconsin Steel Works of International Harvester Co.*, 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976); *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974); *Copeland* v. *Marshall*, 641 F.2d 880 (D.C. Cir. 1980) (*en banc*). While stringent and fixed standards might unduly restrict the ability of the trial courts to consider the totality of the case in setting fees, some guidance is needed to eliminate the proliferation of inconsistent, ad hoc attorneys' fee determinations emanating from the district courts. As it presently stands, significant fluctuations in the hourly rates awarded to counsel will occur between the various circuits. For example, district courts in the Eighth Circuit are instructed that when setting reasonable hourly rates in fee awards cases, they should apply "the rates charged by attorneys of like skill and for similar work *in the general locality in which the litigation takes place.*" *Jorstad* v. *IDS Realty Trust*, 643 F.2d 1305, 1313 (8th Cir. 1981) (emphasis added).[18] However, the decision below specifically reversed the District Court for its reliance upon local billing rates.[19]

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[18] *Compare* the "reasonable attorney's fee" provision of the Consumer Product Safety Commission Improvement Act of 1976 which similarly provides that hourly billing rates should be based upon "the rate prevailing for the provision of similar services with respect to actions brought in the court which is awarding such fee." 15 U.S.C. § 2059(e)(4).

[19] Significantly, the District Court's decision was based upon the affidavits submitted by Uniroyal of prominent trial attorneys from South Bend. This is precisely the nature of evidence which the

This inconsistency, and the Seventh Circuit's standard in particular, works an injustice on the defendant in a fee award case when it burdens a defendant with above average hourly rates to which the defendant has never consented, as is normally the case in the matter of legal fees. The fee-shifting requirement present in Title VII fee determination cases results in defendants being required to pay a fee to an attorney with whom they had no relationship except adversarial. The defendants have no ability to control or even monitor the actions, expenses or fees of opposing counsel.

The decision of the Seventh Circuit opens the door for *de novo* appellate review of the hourly billing rate awarded in thousands of discrimination cases brought under Title VII and related statutes. Such determinations of the district courts must be subject to the "clearly erroneous" standard of Rule 52(a) to avoid the unnecessary volume of attorney fee disputes which are coming before the courts of appeals. *See National Association of Concerned Veterans* v. *Secretary of Defense*, 28 FEP Cases at 1143 n.18.

D.C. Court of Appeals suggests is relevant in *National Association of Concerned Veterans* v. *Secretary of Defense:*

> An applicant is required to provide specific evidence of the prevailing community rate for the type of work for which he seeks an award. For example, affidavits reciting the precise fees that attorneys with similar qualifications have received from fee-paying clients in comparable cases provide prevailing community rate information. On the other hand, generalized "information and belief" affidavits from friendly attorneys presenting a wide range of hourly rates will not suffice.

28 FEP Cases at 1138-1139.

In contrast, the only affidavits proffered by plaintiffs in support of their requested rates came from non-practicing attorneys who merely urged the awarding of the requested rates without any justification for such rates.

CONCLUSION

For the reasons stated above, Uniroyal respectfully requests this Court to grant its petition for a Writ of Certiorari to the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 81-1557 & 81-1633

ALTA CHRAPLIWY, et al.,

Plaintiffs-Appellants and Cross-Appellees,

v.

UNIROYAL, INC., a corporation,

Defendant-Appellee and Cross-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.
No. S72-C-0243—Robert A. Grant, *Judge.*

ARGUED OCTOBER 1, 1981—DECIDED FEBRUARY 16, 1982

Before CUMMINGS, *Chief Judge,* FAIRCHILD, *Senior Circuit Judge,* and BROWN, *Senior District Judge.*[*]

FAIRCHILD, *Senior Circuit Judge.* The plaintiffs in this case are female workers who were employed by the defendant. In 1972, they filed a class action under Title VII of the Civil Rights Act of 1964, alleging that the defendant had engaged in the practices of segregated hiring and seniority rosters.

In 1979, the parties reached a settlement favorable to the plaintiffs, amounting to $9,318,000 in cash and pen-

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[*] Senior District Judge Wesley E. Brown of the District of Kansas sitting by designation.

sion benefits, in addition to reinstatement of 296 terminated class members to active employment with full seniority. The defendant also agreed to pay attorneys' fees to the plaintiffs, in an amount to be established by the district court.

Accordingly, the plaintiffs applied to the district court for an allowance of attorneys' fees pursuant to Section 706(k) of Title VII, 42 U.S.C. § 2000e-5(k), with an initial amount of $1,510,768 for the number of hours worked times the hourly rates for the plaintiffs' eleven attorneys. The plaintiffs also sought additional allowances for the risks of litigation and quality of representation.

The district court allowed a fee of $833,679, which included an initial amount of $583,679 for hours times hourly rates, $50,000 for the risks of litigation, and $200,000 for the quality of representation.

The plaintiffs have appealed this fee award, claiming that the district court erred in lowering the hourly rates and number of hours worked. The plaintiffs further claim that the district court abused its discretion in awarding only $250,000 for risk and quality. The defendant has filed a cross-appeal, challenging only the additional $250,000 awarded for risk and quality as too generous.

Thus, the issues raised by this appeal concerning the district court's award of attorneys' fees to the prevailing plaintiffs, pursuant to Section 706(k), 42 U.S.C. § 2000e-5(k), are as follows:

1. Did the district court err in concluding that as a matter of law it was required to refuse to award attorneys' fees to the prevailing plaintiffs for time spent persuading the federal government to debar the defendant from its federal contracts on account of discrimination in employment, although these efforts by the plaintiffs led to the settlement of the Title VII action?

2. Did the district court err in concluding that as a matter of law it was required to lower the hourly

rates customarily charged by the plaintiffs' attorneys to rates within the range of hourly rates customarily charged by attorneys in the locality where the district court sits?

3. Did the district court abuse its discretion in awarding to the plaintiffs additional fees of $50,000 for the risks of litigation and $200,000 for the quality of representation?

We find that the district court erred in concluding that as a matter of law it was required to refuse to award attorneys' fees for the time spent by the plaintiffs persuading the federal government to debar the defendant from its federal contracts. We also find that the district court erred in concluding that as a matter of law it was required to lower the hourly rates customarily charged by the plaintiffs' attorneys to rates customarily charged by attorneys in South Bend, Indiana, where the district court sits.

We find that the district court did not abuse its discretion in awarding $50,000 for risks and $200,000 for the quality of representation. However, in light of our conclusions as to the initial amount determined by the district court, it will be necessary that on remand the district court also reconsider the award of $200,000 for quality.

I. FACTS

The plaintiffs brought a class action in 1972 pursuant to Title VII of the Civil Rights Act of 1964 on behalf of all female workers employed by the defendant at its plastics plant in Mishawaka, Indiana. The plaintiffs challenged the defendant's system of segregated hiring and seniority. In July of 1973, the district court granted the plaintiffs' motion for partial summary judgment on issues of liability, based on the defendant's continued failure to respond to requests for admissions. This decision established the defendant's general liability for sex discrimination. *See Chrapliwy v. Uniroyal, Inc.*, 509 F.Supp. 442, 445 (N.D. Ind. 1981).

In October of 1974, Judge Beamer, who had been handling the case, died. His death and the resulting vacancy on the district court delayed further proceedings.

Time was passing, and there was further delay. It appeared that defendant was taking advantage of the situation, and doing nothing to provide relief for members of the plaintiff class. Beginning in 1975, plaintiffs sought to obviate further delay in the Title VII action by attempting to persuade the federal government to notice defendant's discriminating practices which were the subject of the Title VII action and to take action against defendant based on such discrimination.[1] These activities resulted in several court and administrative proceedings, involving the plaintiffs, the defendant, and the Departments of Labor, Defense, and the Interior. *See Chrapliwy, supra*, 509 F.Supp. at 445-448.

The defendant first attempted to use the Title VII action to stave off the government's investigation under Executive Order 11246. The Department of the Interior had issued a deficiency letter to the defendant, and the defendant's response was that since the Title VII suit was underway, it was already defending itself against the same charges of discrimination. The Department initially agreed to defer action pending the outcome of the Title VII suit, but began an active investigation of the defendant's possible violation of Executive Order 11246 when the plaintiffs continued to press the government to act. *See Chrapliwy, supra*, 509 F.Supp. at 445-446.

In February of 1976, the defendant moved to dismiss the Title VII action, claiming that the plaintiffs' pursuit of relief through enforcement of Executive Order 11246 amounted to misconduct.[2] The court denied the motion,

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[1] Executive Order 11246 prohibits federal contractors from discriminating against employees on the basis of sex, race, or other impermissible grounds. The contractor can be debarred from its contracts and declared ineligible for future contracts in the event of noncompliance with the Order.

[2] *See Chrapliwy, supra*, 509 F.Supp. at 461.

upholding the plaintiffs' right to pursue the defendant's debarment, which involved issues identical to the basic issues in the Title VII action itself.[3] The court noted that "[a]s representatives of the class, [the plaintiffs] were charged with the responsibility of initiating what ever action would be necessary to vindicate the rights of the entire class against the alleged discriminatory employment practices of Uniroyal."[4]

In October of 1979, less than one week before the defendant was to lose a large federal contract as a result of the government's investigations of a violation of Executive Order 11246, the parties settled the Title VII action. The district court found that the plaintiffs' efforts to persuade the government to debar the defendant from its federal contracts directly contributed to the settlement of the Title VII action. *See Chrapliwy, supra*, 509 F.Supp. at 451. The defendant admitted that it would not have settled the suit if the threat of debarment did not loom near. *Id.*

In making the award of attorney's fees, the district court first determined that it should calculate fees by the "lodestar" method. *Id.*, at 449-450.[5] The court evi-

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[3] *See id.* 466.

[4] Unpublished Memorandum of June 8, 1976, Joint Appendix, 175, 177.

[5] The method for determining a "lodestar" amount is to multiply the allowable hours worked by a reasonable hourly rate for each attorney. This "lodestar" amount may then be raised or lowered to recognize other factors. Various courts of appeals have adopted the "lodestar" method. *See, e.g., Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980); *Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator and Standard Sanitary Corp.*, 487 F.2d 161 (3rd Cir. 1973); *City of Detroit v. Grinnell Corp.*, 560 F.2d 1093 (2nd Cir. 1977); *Grunin v. International House of Pancakes*, 513 F.2d 114 (8th Cir. 1975).

This court has never expressly adopted the "lodestar" method as such. We have, however, approved a method of calculating fees which approximates the "lodestar" approach. In *Waters v. Wisconsin Steel Works*, 502 F.2d 1309 (7th Cir. 1974), and,

(Footnote continued on following page)

dently found that the number of hours requested by the plaintiffs had been reasonably expended, reducing those hours only to the extent necessary to preclude the plaintiffs from receiving attorneys' fees for the hours spent in persuading the federal government to debar the defendant from its federal contracts. Likewise, the court evidently determined that the hourly rates requested by the plaintiffs were reasonable, ranging from $200 and $175 per hour for counsel from New York and Washington, D.C., respectively, down to $50 to $70 per hour for counsel from around the South Bend area, where the district court sits. The court noted that:

> The caliber of counsel here was equally matched. This is not the case of a small, relatively unsophisticated corporate defendant, suddenly faced with high priced counsel running up the clock at an exorbitant hourly rate. The rate on both sides reflects the price talented lawyers can command. It would not advance the congressional policies . . . to arbitrarily limit plaintiffs' attorneys to the local billing rate when the defendant has utilized the resources of equally expensive, and presumably equally talented, attorneys. If Uniroyal had primarily used local counsel in its defense, it would have a far better argument in favor of restricting [plaintiffs] to the local billing rate. . . . The legal profession no longer operates in a strictly local product market, and the attorney's fee provision of Title VII cannot be utilized to unrealistically tie the fees paid to the locality's wage scale.

Chrapliwy, supra, 509 F.Supp. at 456.

The district court further decided to use present instead of historical billing rates, to offset inflation

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[5] *continued*

more recently, in *State of Ill. v. Sangamo Construction Co.*, 657 F.2d 855 (7th Cir. 1981), we approved of using "hours times billing rate" as a convenient starting point in determining a fee award "from which adjustments can be made for various other elements." *Waters, supra*, 502 F.2d at 1322.

which had increased the price levels above those in effect at the time the suit was instituted in 1972.[6]

After determining that the rates and hours were reasonable, however, the district court decided that the requested billing rates had to be "balanced" against the local billing rates in the South Bend area. *Id.*, at 456-457. Based on affidavits submitted by the defendant, the court found that the local rates ranged from a low of $35 per hour in 1973 to $85 per hour in 1980, depending, however, on the skill of the attorney. *Id.*, at 455.

Although the court referred to "balancing" the rates requested by the plaintiffs against the local rate, the court in fact limited the plaintiffs to a local rate. *Id.*, at 458-459. The court set rates ranging from $75 per hour for counsel from Washington, D.C. and New York to $50 per hour for others. *Id.*

The district court excluded all hours spent by the plaintiffs to persuade the federal government to enforce Executive Order 11246 and debar the defendant from its federal contracts. The court determined that the statutory language of Section 706(k) and the holding in *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980) precluded an award of fees for such work. *Id.*, at 451-453.

After determining the basic fee of allowed hours times allowed rates, amounting to $583,679, the district court evaluated the factors listed in *Waters, supra*, 502 F.2d at 1322, for determining the reasonableness of a fee. Accordingly, the court raised the basic fee by $50,000 for risk and $200,000 for the quality of representation. *Id.*, at 459-462.

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[6] The court noted that the Consumer Price Index for October 1972 was 126.6. In July, 1980 it was 248, an increase of 95% over eight years. *Chrapliwy, supra*, 509 F.Supp. at 457. Compensation for delay might have been achieved by computation of interest, a percentage allowance for inflation, or a similar allowance in choosing a so-called multiplier. No party seems to challenge the device the court used.

II. HOURS REASONABLY EXPENDED

In general, a district court's award of attorneys' fees will only be reversed if the court abused its discretion.[7] Error of law, however, is also a ground for reversing what would ordinarily be a discretionary ruling.[8] If a judge erroneously thought the law required him to do what he did, the judge did not exercise discretion.

We are also mindful of the congressional goal of eliminating discriminatory practices in employment by encouraging private litigants who are injured by such practices to bring Title VII actions. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 420 (1978).[9] Congress intended to encourage these private litigants to hire counsel capable of putting forth a rigorous prosecution to meet the rigorous defense which defendants would be likely to assert. *Id.*, at 419.

As we have stated before, in *Waters*, *supra*, 502 F.2d at 1322, and *State of Ill. v. Sangamo Construction Co.*, *supra*, 657 F.2d at 855, 862 (7th Cir. 1981), the convenient starting point for determining a reasonable fee award is to multiply "the reasonable hours devoted to the litigation [by] the reasonable billing rate for that work." *Sangamo Construction Co.*, *supra*, 657 F.2d at 862. Once that basic fee is determined, it may be adjusted upward or downward, based on the elements outlined in *Waters*, if necessary to arrive at a reasonable fee.[10]

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[7] *See, e.g., Waters, supra*, 502 F.2d at 1322; *Mirabal v. General Motors Acceptance Corporation*, 576 F.2d 729, 730 (7th Cir. 1978); *Coop v. City of South Bend*, 635 F.2d 652, 655 (7th Cir. 1980).

[8] *See, e.g., Syvock v. Milwaukee Boiler Manufacturing Co., Inc.*, 665 F.2d 149, 162 (7th Cir. 1981).

[9] *See also Parker v. Califano*, 561 F.2d 320 (D.C. Cir. 1977); *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

[10] This mode of analysis established in *Waters* is similar to the "lodestar" method discussed *supra*, at footnote 3.

(Footnote continued on following page)

The first step in the analysis outlined in *Waters* and *Sangamo Construction Co.* is to determine the number of hours reasonably expended to obtain relief in the action. It is recognized that a judge, from experience, is sufficiently informed so that he may exercise some discretion in deciding that the requested number of hours was not reasonably expended.[11] In this case, counsel for each party worked approximately 11,000 hours. This similarity of hours expended would make it difficult to reduce the plaintiffs' claim of hours spent on that ground, and the district court did not do so.

The district court did, however, reduce the plaintiffs' requested hours to preclude recovery for their efforts to persuade the federal government to debar the defendant from its federal contracts. The court determined that *Carey, supra*, and Section 706(k) of Title VII precluded

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[10] *continued*

Other recent decisions of this court are consistent. In *Mills v. Eltra, Appeal of Ratner*, 663 F.2d 760, 763 (7th Cir. 1981) the court allowed a fee computed by multiplying the number of hours reasonably expended by 150% of the applicant's normal billing rate. The higher rate was used as a multiplier because the case was considered a contingent fee case. Slip op., p. 7.

In *Syvock v. Milwaukee Boiler*, 665 F.2d 149, 162-165 (7th Cir. 1981) we held that the district court applied *Waters* without abuse of discretion in determining initially the number of compensable hours and in refusing an additional 25% on account of the contingent character of the arrangement. We held, however, that the judge erred in a further reduction of hours because plaintiff did not succeed on all elements of his claim, and we directed an increase in the fee to correct that error.

[11] For example, an attorney may overstate his hours mistakenly, through faulty records. There may be duplication of services by two attorneys. The attorney may have devoted time inefficiently or have otherwise accumulated a number of hours beyond those reasonably required for the case.

an award for these hours. In this respect, we think the court erred.[12]

In *Carey*, the plaintiff first filed a claim of discrimination with the EEOC. The EEOC, as required by Title VII, deferred to the proper state administrative agency. When the EEOC later issued a right to sue letter, the plaintiff filed a Title VII action in federal court. A settlement was reached in the state proceedings, so the Title VII action was voluntarily dismissed, with the exception of the petition for attorneys' fees.

The Supreme Court held that Section 706(k) of Title VII authorized "an award of attorney's fees for work done by the prevailing complainant in state proceedings to which the complainant was referred pursuant to the provisions of Title VII." *Carey, supra*, 447 U.S. at 71.

The district court interpreted *Carey* as requiring the exclusion of fees for services related to "collateral proceedings" except when those proceedings are mandated by Title VII. *Chrapliwy, supra*, 509 F.Supp. at 452. The court concluded that the various actions taken by the plaintiff to persuade the government to debar the defendant were not "mandatory procedures" and consequently counsel's services therein could not be compensated, based on the rule in *Carey*. *Id.*

The services at issue in *Carey* were performed in the course of state proceedings. The Title VII action produced little except the award of attorney's fees. The Supreme Court decided that the statute authorized an allowance in a Title VII action for services rendered

[12] If the district court had first decided that the award of attorneys' fees for the plaintiffs' efforts to have the defendant debarred from its federal contracts could be granted as a matter of law but then for some reason determined that such an award should not be granted based on special circumstances of the case, then our task would be to ask first whether the court erred as a matter of law in determining that such fees could be granted and second whether the court abused its discretion in refusing to award such fees.

and results obtained primarily outside of the Title VII action, in state court and administrative proceedings.

The case before us is substantially different from *Carey*. The Title VII action was well underway when the plaintiffs began activities regarding the defendant's debarment. Class certification had been granted; discovery had begun; and partial summary judgment had been granted in favor of the plaintiffs as to the defendant's liability. The defendant delayed in responding to discovery requests. Judge Beamer's death caused further delays. Time was passing, and the plaintiffs sought an efficacious way to bring about an end to the Title VII action with relief for all class members. The plaintiffs' pursuit of the defendant's debarment was a viable avenue for obtaining such relief, because the issues and factual background were the same for both the Title VII action and the enforcement of Executive Order 11246.[13]

The plaintiffs' efforts proved successful. The perseverance of the plaintiffs in their efforts to persuade the government to debar the defendant from its federal contracts led directly to the settlement of the Title VII action.

In responding to the defendant's motion to dismiss the Title VII action because of the plaintiffs' efforts to have the defendant debarred, the district court noted that the plaintiffs were carrying out their responsibilities as representatives of the class in doing whatever was necessary to vindicate the rights of the class against the discriminatory employment practices of the defendant.[14] Thus, the district court recognized that the plaintiffs pursued the debarment of the defendant for the purpose of achieving their ultimate goal of relief in the Title VII suit. We do not read *Carey* as precluding an award of attorney's fees for such efforts.

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[13] Unpublished Memorandum of June 8, 1976, Joint Appendix, 175, 176.

[14] *Id.*, at 177.

If *Carey* has any application to the particular question before us, it is in indicating that the statute should be liberally rather than restrictively interpreted with respect to fees for services not performed, in the ordinary sense, in proceedings before the Title VII court. The Supreme Court expressly recognized that a liberal view toward fees would further Congress' goal of "[making] it easier for a plaintiff of limited means to bring a meritorious suit." 447 U.S. at 63, *quoting Christiansburg Garment Co., supra*, at 420.

The district court further decided that the language of Section 706(k), apart from *Carey*, prohibited including compensation for plaintiffs' efforts to have the defendant debarred from its federal contracts. *Chrapliwy, supra*, 509 F.Supp. at 451. Section 706(k) permits a fee award "In any action or proceeding under this subchapter. . . ." The district court read this language as requiring "that the attorney's time and efforts be mandated by the Title VII statute, or by related and required procedures" and his "time must be within the Title VII procedure." *Id.*

We think this interpretation of Section 706(k) is too narrow. The plaintiffs at all times pursued their Title VII action. Their efforts to have the defendant debarred from its federal contracts on the basis of the same discrimination charged in the Title VII action were designed to move the Title VII case toward ultimate dispostion. This desired effect was achieved, because the threat of debarment on account of discrimination caused the defendant to settle the Title VII action. Thus, the plaintiffs' pursuit of debarment was a service which contributed to the ultimate termination of the Title VII action, and in that sense was within the Title VII action.

We therefore conclude that neither Section 706(k) nor the *Carey* interpretation thereof precludes an award of attorneys' fees to the prevailing plaintiffs for their efforts in persuading the federal government to enforce Executive Order 11246. Rather, Section 706(k) should be interpreted as allowing attorneys' fees to the prevail-

ing plaintiffs for services which contribute to the ultimate termination of the Title VII action.[15]

III. REASONABLE BILLING RATE

The second step in the analysis outlined in *Waters* and *Sangamo Construction Co.* for determining an award of reasonable attorneys' fees is to determine the reasonable billing rate.

From the outset, we recognize that a particular attorney may have special skills or experience which raise the value of his time above the value of another attorney's time. However, here again, as with hours, a judge is not required to accept an attorney's valuation of his own time. A judge may well approach high rates with skepticism, and he may exercise some discretion in lowering such rates.[16]

In the case before us, the district court evidently determined that the hourly rates requested by the plaintiffs for each attorney were reasonable. *Chrapliwy, supra*, 509 F.Supp. at 455-456. The court noted that the defendant's attorneys billed the defendant at rates comparable to the hourly rates sought by the plaintiffs. Furthermore, the court noted that the caliber of counsel

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[15] *Accord, Kulkarni v. Alexander*, 22 FEP Cases 1470, 1477 (D.C. Cir. 1978). *See also Sullivan v. Bureau of Vocational Rehab.*, ... F.2d ..... (3rd Cir. 1981); *Porter v. District of Columbia*, 502 F.Supp. 271 (D.D.C. 1980). *Cf. Kennedy v. Whitehurst*, 509 F.Supp. 226 (D.D.C. 1981). We note that the fact that neither the plaintiffs nor the defendant were formal parties in all of the "collateral proceedings" is irrelevant to our conclusion. The plaintiffs and defendant were parties in the Title VII action, and we have concluded that the plaintiffs' activities regarding debarment contributed to the outcome of the Title VII action.

[16] For example, an attorney may be overqualified for particular services which could reasonably be performed by a less skilled or experienced attorney or by a lay person. In such a case, it may be unreasonable to value the attorney's time at his regular billing rate. Or, an attorney may bill at a high rate but rarely collect at that rate.

for each side was equally matched. Both sides utilized the services of widely recognized attorneys. Finally, the court noted that the congressional policy of Section 706(k) would not be advanced by arbitrarily limiting the plaintiffs' attorneys to a "local" billing rate when the defendant utilized equally expensive and equally talented attorneys. *Id.*

The court decided, however, that "the plaintiffs' attorneys' billing rate must, of course, be balanced against the local billing rate to achieve the reasonable rate required by the statute." *Id.*, at 456. The local rates in the South Bend area were found to be approximately $85 per hour in 1980. *Id.*, at 455. In "balancing" local rates with the plaintiffs' requested rates, the court actually limited the rates to local rates. The court lowered the rate of lead counsel from Washington, D.C. from $175 per hour to $75 per hour; and the rates of other New York and Washington counsel from $200 to $75, $110 to $50, and $175 to $75.[17]

We think the court erred as a matter of law in limiting the hourly rates to local rates charged in the South Bend area.

If a high priced, out of town attorney renders services which local attorneys could do as well, and there is no other reason to have them performed by the former, then the judge, in his discretion, might allow only an hourly rate which local attorneys would have charged for the same service. On the other hand, there are undoubtedly services which a local attorney may not be willing or able to perform. The complexity and specialized nature of a case may mean that no attorney, with the required skills, is available locally.

In our case, the district court did not question the reasonableness of the hourly rates requested by the plaintiffs. The court recognized that the defendant availed itself of counsel charging rates comparable to the rates

[17] The rates of local assisting counsel were reduced without explanation.

requested by the plaintiffs.[18] The court did not indicate skepticism over the need for out of town counsel. In fact, the court recognized that Congress intended to encourage plaintiffs to employ counsel capable of putting forth a rigorous prosecution to meet the rigorous defense which defendants would most likely assert.

The district court's discussion of "local billing rates versus the attorney's usual billing rate" is set forth in 509 F.Supp. at 455-457. In treating the *Waters* listing of "The fee customarily charged in the locality for similar legal services" as a factor to be considered, the court seems to have read "locality" as "locality where the cause is heard."

The fee customarily charged for similar services in the locality where services are rendered is doubtless relevant even where the attorney normally practices

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[18] The defendant has argued that comparing the rates charged by its attorneys with those charged by the plaintiffs' attorneys is improper. We reject this argument. The rates charged by the defendant's attorneys provide a useful guide to rates customarily charged in this type of case. Also, when the defendant has hired expensive, out of town counsel, the plaintiffs seem justified in saying that the nature of the case required the skills of out of town specialists. *See North Slope Borough v. Andrus*, 515 F.Supp. 961 (D.D.C. 1981). Such a comparison of rates does not conflict with this court's holding in *Mirabal, supra*, 576 F.2d at 730-731. In that case, the plaintiff recovered $2,000 under the Truth in Lending Act, and then requested a fee of $30,000, arguing that such a fee was reasonable because the defendant's attorney received a similarly high fee. This court held that a fee award in excess of the judgment would require circumstances not present in the case, and that granting large fee awards for small injuries would encourage litigation not in the interests of clients or the public. This court noted that determining the plaintiff's fee based on the fees charged by the defendant's attorney may have little relevance to the value which the plaintiff's attorney provided in the case. In the case before us, however, we suggest that the hours and hourly rates charged by the defendant's attorneys provide a helpful guide in determining whether similarly high rates and hours requested by the plaintiffs were reasonable.

elsewhere. On the other hand the *Waters* list of factors comes from American Bar Association Disciplinary Rule 2-106, which begins with a prohibition against charging clearly excessive fees. In that context the fee customarily charged for similar services in the locality, if different, where the attorney normally practices is also relevant. Pertinent questions where, as here, a court is fixing a fee to be paid by an opponent are whether services of like quality are truly available in the locality where the services are rendered, and whether the party choosing the attorney from elsewhere acted reasonably in making that choice. There is no suggestion that the district court would have answered either of these questions adversely to plaintiffs.

Attorneys with specialized skills in a narrow area of law, such as admiralty law, patent law, or antitrust and other complex litigation, tend to be found in large cities, where an attorney may have a greater opportunity to focus on a narrow area of law. As a specialist, the attorney will usually charge more for performing services in his area of expertise than a general practitioner will charge for performing similar services. Furthermore, the costs of practicing law will vary from city to city, and such costs will be reflected in the rates of the attorneys.

We think that a judge, in allowing an attorney's fee under Title VII or similar statute, has discretion to question the reasonableness of an out of town attorney's billing rate if there is reason to believe that services of equal quality were readily available at a lower charge or rate in the area where the services were to be rendered.

If, however, a party does not find counsel readily available in that locality with whatever degree of skill may reasonably be required, it is reasonable that the party go elsewhere to find an attorney, and the court should make the allowance on the basis of the chosen attorney's billing rate unless the rate customarily charged in that attorney's locality for truly similar services is deemed to require an adjustment.

In any event, "The fee customarily charged in the locality" remains one of a number of factors to be considered as guides, and nothing in *Waters* or the Disciplinary Rule makes that factor an overriding limitation.

Although the district court seems to have disclaimed limiting counsel to South Bend rates, it appears that that in fact happened, without any suggestion that the choice of counsel was improvident or counsel's billing rates were out of line with those charged by available counsel of similar expertise, otherwise similarly situated. We conclude there was error. In our view the allowance should have reflected the billing rates as requested. It follows that when the number of hours, as restored, are multiplied by the billing rates requested, the initial amount determined will be close to the $1,510,768 for which plaintiffs contend, subject to minor adjustments.[19]

IV. RISK AND QUALITY

The third and final step in the analysis of determining an award of reasonable attorneys' fees is to evaluate the eight guidelines listed in *Waters*, *supra*, 502 F.2d at 1322, which in some cases may require an adjustment, upward or downward, of the basic fee of hours times hourly rate. In this case, the district court adjusted the basic fee awarded to the plaintiffs upward, to allow an extra $50,000 for risk and $200,000 for quality of representation. Both the plaintiffs and the defendant challenge this extra award as an abuse of the trial court's discretion, the plaintiffs claiming that the award is low, and the defendant claiming that the award is high.

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[19] The district court's opinion includes a table which states the requested hours and requested rates for the plaintiffs' attorneys' fees. *See Chrapliwy*, *supra*, 509 F.Supp. at 458-459. The plaintiffs have included a similarly constructed table in their reply brief, but the hours requested are different in number from the hours shown on the district court's table. We leave to the district court the task of determining the need for any adjustments in these numbers.

The district court explained in detail its reasons for granting this extra award above the basic fee. First, the court noted that the plaintiffs' attorneys worked for seven years without compensation. Their fees were contingent on the outcome of the litigation. They invested over 11,000 hours, plus expenses, in this risk. They faced a long and difficult battle against equally talented attorneys for the defendant, "no ground was surrendered without a struggle, and Uniroyal litigated each issue in this case until the debarment proceeding commanded a final settlement." *Chrapliwy, supra*, 509 F. Supp. at 460. Fifty thousand dollars to account for the risks involved in representing the plaintiffs on a contingent basis in a complex class action is a modest, if not meager, award.

The plaintiffs claim that the risks were substantially greater than the district court recognized, while the defendant claims that the plaintiffs faced relatively no risks after the initial summary judgment in July of 1973. The allowance of $50,000 for risk reflects the district court's careful evaluation of the facts, and though the allowance is meager, we cannot say the district court abused its discretion in fixing the amount.

Second, in awarding $200,000 for quality, the court found that the plaintiffs' attorneys brought to this litigation experience, reputation, and ability in handling complex cases, particularly the ability to handle Title VII cases. The court determined that the results obtained for the plaintiffs, after years of opposing the talented, nationally recognized law firms representing the defendant, demonstrated these abilities. Indeed the total recovery was substantial, some $9,000,000, cash in part and value of benefits in part, as well as reinstatement of nearly 300 employees. The court also noted that one of the results obtained was that the "actions of the plaintiffs' attorneys forced the Labor Department to create a working enforcement system to implement Executive Order 11246, and police other federal contractors in their compliance with its procedures." *Chrapliwy, supra*, 509 F.Supp. at 462.

The district court's consideration of quality was appropriate, and the court carefully evaluated its reasons for allowing the extra $200,000 for quality. However, we have determined that the plaintiffs should be awarded a basic fee which reflects the requested hourly rates of each attorney. The hourly rates for the plaintiffs' out of town counsel are higher than rates charged by attorneys in the South Bend area. The reason for allowing the higher rates is that the nature of the case commanded the expertise of attorneys with specialized skills in handling complex litigation and Title VII cases. These experts charge higher fees than local attorneys because of the quality of representation they provide in their area of expertise. Thus, the hourly rates to be allowed by the district court on remand of this case seem to include some of the elements considered in the court's quality award, so that the $200,000 awarded by the district court for quality may overlap with the quality factor implicit in the hourly rates.

Furthermore, we have determined that the plaintiffs are to be awarded attorneys' fees for their efforts in persuading the government to debar the defendant from its federal contracts. The district court seems to have included something for these efforts in the award for quality. The district court should determine on remand whether there is any duplication.

As a result of these possible overlaps, we direct that on remand the court should, if it finds unfair duplication in the award for quality, make an appropriate adjustment.

V. CONCLUSION

Insofar as the district court's judgment limited recovery of attorneys' fees for the prevailing plaintiffs to $583,679 for the basic fee of hours times hourly rates, and insofar as it reflected an additional $200,000 for quality, it is reversed, and the cause remanded for further proceedings consistent with this opinion. In all other respects the judgment is AFFIRMED. Circuit Rule 18 shall not apply on remand. Costs of appeal, including attorneys' fees, are allowed to appellants.

The district court is directed to determine the amount of fees to be awarded to the plaintiffs for the services of their attorneys in this appeal. Although the plaintiffs have not prevailed on all issues argued, we consider the time spent to address issues on which they have not prevailed to have been reasonably expended.[20]

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[20] *See Syvock, supra*, 665 F.2d at 164.

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

ALTA CHRAPLIWY, et al., *Plaintiffs,* v. UNIROYAL, INC., et al., *Defendants.*	CIVIL NO. 72 S 243 MEMORANDUM

Introduction

The award of attorney fees in this case represents the final question in a suit that has continued for seven years. This litigation resulted in a settlement between the parties providing that defendant Uniroyal, Inc., (Uniroyal), pay 526 women in the plaintiff class $4,758,000 in cash, and approximately an equal amount in future pension benefits on account of unlawful sex discrimination in violation of Title VII of the Civil Rights Act of 1964. In addition to this monetary relief, Uniroyal must also reinstate 296 class members to active employment with full seniority, and improve the position of women workers generally through changes in the employment system at the defendant's Mishawaka plant.

As a further part of the settlement, Uniroyal agreed to pay plaintiffs' attorneys' fees in the "amount awarded" by the court, subject, of course, to any later appeal, as provided in Section 706(k), 42 U.S.C. § 2000(e)-5(k) which states:

> In any action or proceeding under this subchapter, the court, in its discretion, may allow the prevailing

> party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs. . . .

Petitioners are, of course, the prevailing parties within the meaning of Section 2000(e)-5(k). *See Maher* v. *Gagne*, 100 S.Ct. 2570, 2575 (1980).

It now becomes the duty of this Court to determine what is a "reasonable fee" within the meaning of Section 2000(e)-5(k). The reasonable fee must reflect the long history of this litigation, as well as a consideration of the congressional policies underlying Title VII.

I. *Factual Background*

After passage of the Civil Rights Act of 1964 making sex discrimination unlawful, Uniroyal continued to maintain a segregated hiring and seniority system at its Mishawaka plant where women were heavily employed in the footwear production division, while other lines had predominantly male employees. From 1968-1970, Uniroyal shut down its footwear production, while continuing its other production divisions, throwing a disproportionate number of women out of work. Despite the considerable plant seniority of many women employees, they were not given a chance to "bump" less senior male workers from other production lines.

In November and December of 1969, Uniroyal mailed a form letter to 260 laid-off female employees notifying them that inasmuch as the prospects of their being recalled were "remote", the company was declaring their layoffs permanent and, as a result, was cutting off their supplemental unemployment benefits.

In January, 1970, Alta Chrapliwy and other female workers at the Mishawaka plant filed charges with the Equal Employment Opportunity Commission, (EEOC). The

EEOC investigation found reasonable cause to believe discrimination had taken place, and after conciliation failed, the EEOC issued a right to sue letter.

1972—1974

On November 28, 1972, a complaint was filed by the 26 named plaintiffs as a class action on behalf of all female workers employed at Uniroyal's Mishawaka plant. Included as defendants were Uniroyal, Local 65 of the United Rubber Workers (Union), and the United Rubber Workers International. Uniroyal sought dismissal of this complaint, which was denied, and the plaintiffs began discovery proceedings with interrogatories and request for production of documents.

Although Uniroyal delayed its response, the Union complied with the discovery requests. Based upon this information, plaintiffs then drafted requests for admissions from Uniroyal. When Uniroyal failed to respond, plaintiffs filed a motion for sanctions and partial summary judgment on liability issues. The then active Judge of this Court, Judge George N. Beamer, deemed the requests for admissions to be admitted due to Uniroyal's continued failure to respond. It was this decision, in July, 1974, that established the company's general liability for sex discrimination. Uniroyal's motion to vacate this partial summary judgment was denied.

Following this, other requests for admissions detailing the discriminatory employment system were admitted by Uniroyal. Class action certification had previously been granted. Another plaintiffs' motion for partial summary judgment was pending when, on October 21, 1974, Judge Beamer died. His death and the resultant vacancy on this Court delayed proceedings in the case. Uniroyal did not reply to the September, 1974 summary judgment motion until August, 1976. Although Uniroyal's violation of Title

VII had been judicially determined, Uniroyal did nothing in the interim to provide relief for members of the plaintiffs' class.

1975—1976

In early 1975, plaintiffs began investigating Uniroyal's compliance status with Executive Order No. 11246. That Executive Order provides that federal contractors shall not discriminate against employees on the basis of their sex, race or other impermissible basis. In the event of noncompliance, the government contractor could be declared "ineligible" for any further contracts. The Secretary of Labor was given the power to enforce that Order and to order debarment, as well as the authority to implement such Order with appropriate federal regulations.

Uniroyal is one of the federal government's largest contractors, with approximately half a billion dollar's worth of Defense Department contracts during the 1969-1974 period. Each time it entered a federal contract, Uniroyal signed the required assurances of its compliance with the Executive Order.

Using the then recently enacted Freedom of Information Act, the plaintiffs discovered that the Interior Department had already conducted an on-site compliance review of defendant's Mishawaka plant in September, 1972, and found that Uniroyal was operating a segregated, discriminatory system of employment in violation of the Executive Order. The Interior Department had issued a deficiency letter, but Uniroyal had refused to change its practices, contending that since this Title VII suit was underway, the company was already defending itself against those same charges. The Interior Department then assured the company that it could take no further action while this litigation was still pending.

The plaintiffs then wrote the Secretaries of Labor, Defense and Interior in September of 1975 demanding that administrative action be taken against Uniroyal. The agencies responded by defending their "deferral" of any action. On October 16, 1975, the plaintiffs' attorneys filed suit in the United States District Court in Washington, D.C. for the Chrapliwy class members against the Secretaries of Labor, Defense and Interior. That complaint alleged that these officials were awarding contracts to Uniroyal in violation of their agencies' own regulations and sought enforcement of Executive Order 11246. *Chrapliwy* v. *Dunlop*. The plaintiffs sought a preliminary injunction. With court approval, the parties entered into a stipulation which provided that the officials would conduct a new compliance review of Uniroyal. The officials promised to enforce E. O. 11246 if Uniroyal was not in compliance.

Uniroyal was not a party in *Chrapliwy* v. *Dunlop* until February 27, 1976 when the plaintiffs moved to amend the complaint and join the company. This joinder was short-lived inasmuch as the district court granted the company's motion to dismiss, relying on decisions holding that the Executive Order does not create a private right of action against the employer.

Based upon the results of the compliance inspection that had been agreed upon in *Chrapliwy* v. *Dunlop*, the Department of Interior concluded that Uniroyal was still in violation of Executive Order 11246 and issued a show cause order requesting reasons why administrative action should not be commenced for cancellation of Uniroyal's federal contracts. Uniroyal sought a hearing and an order by the Director of the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) that "substantial issues of law and fact" existed and had to be resolved be-

fore administrative action could be taken. The Chrapliwy plaintiffs opposed the motion, relying upon Judge Beamer's July 5, 1973 summary judgment order. On May 4, 1976, the Director of the OFCCP issued an order which determined that "substantial issues of law and fact" did in fact exist and suggested that the case be referred to the Department of Justice.

The plaintiffs opposed both OFCCP actions. The OFCCP Director reversed his decision to refer the case to the Department of Justice and thereupon issued a notice of intent to debar Uniroyal from government contracting, and commenced an administrative action against the company, *Department of Labor, OFCCP* v. *Uniroyal*, No. OFCCP-1977-1.

The Labor Department had no trial staff to conduct these proceedings, nor had they ever attempted to bar a major industrial corporation. In response to the needs of this case, the Solicitor of Labor hired a lawyer to assemble a trial staff to prosecute this case against Uniroyal.

Based upon these government actions, District Judge Pratt dismissed *Chrapliwy* v. *Dunlop* in September, 1974, and indicated that plaintiffs should exhaust their newly created remedies in the Labor Department's administrative proceedings. The *Chrapliwy* plaintiffs then intervened in the pending *OFCCP* v. *Uniroyal* case, along with defendant Rubber Workers Local Union 65.

In February, 1976, Uniroyal moved to dismiss this Title VII suit because of the pending OFCCP proceedings, which motion was denied. Uniroyal finally filed its response to plaintiffs' 1974 motion for summary judgment, along with a cross-motion for summary judgment. Reply briefs from both sides further delayed court decision in this matter.

1977—1978

At this point in the proceedings, Uniroyal asserted that the pretrial discovery procedures of the Labor Department were void and unconstitutional. One week prior to the Labor Department hearings on these matters, the Company's attorneys returned to this District Court seeking a declaratory judgment that the Labor Department rules for sanction hearings were void. After initially granting Uniroyal's motion for a temporary restraining order, this District Court dismissed the complaint on August 15, 1977, ruling that Uniroyal had not exhausted its administrative remedies. *Uniroyal, Inc.* v. *Marshall*, 20 FEP Cases 477 (N.D. Ind. 1977). (Marshall I). The Company appealed the denial of an injunction, but the judgment was upheld by the Court of Appeals. *Uniroyal, Inc.* v. *Marshall*, 579 F.2d 1060 (7th Cir. 1978).

Due to the proceedings here in *Uniroyal* v. *Marshall (I)*, the start of *Department of Labor, OFCCP* v. *Uniroyal* was delayed from June to November of 1977. Uniroyal still had not answered the government's request for admissions and, consequently, the Administrative Law Judge ordered that these requests be deemed admitted. Plaintiffs filed motions in the OFCCP suit contending that Uniroyal's defense in that action should be stricken, based on the summary judgment proceedings in this case. The plaintiffs' attorneys attended the administrative hearings conducted by the ALJ in South Bend during the month of November. That case was taken under advisement, and on April 11, 1978, the ALJ issued his decision in *Department of Labor, OFCCP* v. *Uniroyal*, which recommended that the Secretary of Labor cancel, terminate, or suspend Uniroyal's existing government contracts and debar Uniroyal from future government contracts "until such time that it can satisfy the

Director of Federal Contract Compliance (OFCCP) that it is in compliance with Executive Order 11246, and the Secretary of Labor's regulations issued pursuant thereto." The ALJ additionally recommended that further sanctions be imposed for Uniroyal's refusal to comply with the discovery regulations. All the parties filed exceptions to the recommended decision. The case was again taken under advisement, this time until June, 1979.

On May 31, 1977, this Court again considered summary judgment motions regarding Uniroyal's business necessity defense, and the company's cut-off of supplementary unemployment benefits to the plaintiffs. These issues were resolved in favor of the plaintiffs, *Chrapliwy* v. *Uniroyal, Inc.*, 458 F.Supp. 252 (N.D. Ind. 1977), and defendant's motion for reconsideration of these issues was denied.

1979—1980

In Washington, Uniroyal had begun negotiations in an attempt to settle the OFCCP debarment action, retaining former New York City Mayor Robert F. Wagner to represent the Company. On June 25, 1979, however, the Chrapliwy plaintiffs filed a new action against the Secretary of Labor, complaining therein of the Secretary's failure to issue a final judgment confirming the ALJ's recommendations of the previous year. The plaintiffs also contended that the Secretary's inaction violated his predecessor's December, 1975 agreement in the *Chrapliwy* v. *Dunlop* case. The plaintiffs requested a district court order that the Secretary issue a decision in the OFCCP case. *Chrapliwy, et al.* v. *Marshall,* Civil No. 79-1647.

On the following day, all the interested parties met in a negotiating session. This group included plaintiffs' attorneys, the OFCCP staff, Uniroyal's lawyers, and the Solici-

tor of Labor. The Solicitor indicated that she would act as the Labor Department prosecutor in the OFCCP action, while other Department attorneys would advise the Secretary when he reviewed the ALJ's recommendations. The end result of this meeting was that the plaintiffs and Solicitor entered joint settlement negotiations with Uniroyal. Two days later, June 28, 1979, Secretary Marshall issued an extensive Decision and Administrative Order, canceling, terminating and suspending Uniroyal's present government contracts and declaring the Company ineligible for any new contracts. *Department of Labor OFCCP* v. *Uniroyal,* 20 FEP Cases 419 (1979). All of the Company's exceptions to the ALJ's decision were overruled in this decision. In response, on July 2, 1979, the Company filed a petition for review of the Secretary's decision with the district court, challenging the validity of the OFCCP pretrial discovery rules, and contending in the alternative that even if these rules were valid, debarment was too extreme a penalty for noncompliance. *Uniroyal* v. *Marshall,* Civil No. 79-1702 (D.D.C. 1979). These plaintiffs were allowed to intervene as defendants, while the Union intervened as a plaintiff. The defendants, in turn, filed for summary judgment and against the granting of a preliminary injunction sought by the Company and Union. These motions were denied, and the defendant's motion for summary judgment granted, in effect reiterating the Secretary's debarment order. The pretrial discovery procedures utilized by the OFCCP were declared to be valid, and the decision to debar Uniroyal for failure to comply with the discovery procedures upheld. *Uniroyal* v. *Marshall,* 482 F. Supp. 364 (D.D.C. 1979). Uniroyal appealed this decision.

There was some disagreement whether Uniroyal was debarred on the merits of the substantive OFCCP charges that the Company had violated the Executive Order, or was

caused by Uniroyal's refusal to obey the prehearing discovery procedures. District Judge Green's order interpreted the Secretary's decision to be based only on Uniroyal's failure on the procedural and discovery issues, and not on the merits of the sex discrimination issues.

Uniroyal, acting upon Judge Green's interpretation, entered negotiations with the Labor Department, seeking a consent decree that would reinstate Uniroyal if it complied with the discovery procedures. The plaintiffs' attorneys were not included in these discussions, despite the *Chrapliwy* plaintiffs' status as intervenors in *Labor Dept., OFCCP* v. *Uniroyal, Inc.* When they learned of these negotiations, they protested against such an agreement, seeking always to defend the plaintiffs' interests before the government officials. On September 7, 1979, these plaintiffs filed a cross-appeal in the U. S. Court of Appeals for the District of Columbia, challenging Judge Green's interpretation of the Secretary's order, and contending that the Secretary's order had included a finding on the substantive violation of the Executive Order. The consolidated appeals of the plaintiffs and Uniroyal were argued, and the case taken under advisement.

In the interim, Uniroyal offered the Labor Department documents, interrogatory answers and officials to depose. Uniroyal then requested that Judge Green compel the Labor Department to reinstate the Company based upon this compliance with the discovery procedures. Judge Green asked the Secretary to reply in writing regarding his position with respect to Uniroyal's attempt to comply.

Despite these actions, time was running out for Uniroyal. By Thursday, October 18, 1979, Uniroyal was less than one week away from losing one of their largest federal contracts, leading the Company to begin serious settlement negotiations with the plaintiffs' and Labor Department's

attorneys. After an intensive weekend of drafting and discussion, an Agreement of Settlement of this class action suit and a Memorandum of Understanding between the plaintiffs and the Department of Labor regarding a plan for distribution of the cash settlement were agreed upon by the parties. As previously stated, Uniroyal agreed to pay $4,758,000 in cash, provide pension benefits with a cash value of approximately $4,560,000 and reinstate 296 of the class members to the recall list with full seniority.

This Court gave its approval, and the settlement monies were distributed. Attorneys' fees were not agreed upon at the time of settlement, reflecting the professional responsibility concerns of conducting these discussions at the same time the client's recovery is being determined. *Prandini* v. *National Tea Co.*, 557 F.2d 1015, 1017 (3d Cir. 1977).

Since the final approval of the Agreement of Settlement, the *Chrapliwy* plaintiffs' attorneys have administered the cash settlement, pensions and reinstatement provisions. Questions regarding taxation obligations under the settlement have been resolved by the Court, while other issues have been resolved by the parties.

II. *Method of Calculation*

Petitioners put forward two alternative theories of fee calculation, either one of which would result in an extremely large fee award. The first theory is that the attorneys should be awarded a contingent fee equal to one-third of the entire financial recovery, including attorneys' fees, and they compute the fees on the contingency basis to be $4,658,510.[1]

[1] The named plaintiffs signed a written contingency fee agreement with the plaintiffs' attorneys early in this case. This agreement does not in any way influence this Court's decision as to what fee should be awarded. *Clark* v. *American Marine Corp.*, 320 F. Supp. 709, 711 (E.D. La. 1970), *aff'd*, 437 F.2d 959 (5th Cir. 1971).

In the alternative, petitioners contend that they have completed more than 11,000 hours of time that is properly billed to this case, and to the respondent Uniroyal, and that, at their normal hourly rate, the total bill for their services would amount to $1,510,768. They further contend that this amount should then be adjusted upward, to reflect the subjective criteria and factors authorized by *Waters* v. *Wisconsin Steel Works of International Harvester Co.*, 502 F.2d 1309, 1322 (7th Cir. 1974). Petitioners suggest that various multipliers be applied to the above figure to satisfy these factors. Specifically, they request a multiplier of 3.5 for the lead counsel, 2.625 for another attorney, and 1.75 for several others. Petitioners then compute that this alternative would entitle them to an award of $5,116,174, and for this reason they suggest that the lower contingent fee basis should be adopted.

The respondent replies that a contingency fee theory is totally inapplicable under Title VII, and, in any case, that the petitioners' proposed method of calculation is wholly incorrect. Instead, Uniroyal contends that the compensable hours of the plaintiffs' attorneys amount to only 6,408.5, and should be compensated at the South Bend hourly average rate for attorneys of equal experience. On this basis, they assert that the proper fee to be paid is $291,718, and that no upward adjustment should be made in this case.

The threshold question we encounter is: what is the proper method of computing this "reasonable fee"—by a contingency fee, an hourly rate, or an adjusted hourly rate?

The historical equitable powers of the federal bench to devise adequate remedies in the attorney's fee area has been sharply limited by the Supreme Court, which has held that fee authorizations should come from Congress, and not the judiciary. *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975). That authorization does exist in

this case, along with the Court's admonition that the district judge should exercise sound discretion in setting an award that will effectuate the purposes underlying Title VII. *Christiansburg Garment Co.* v. *Equal Employment Opportunity Commission*, 434 U.S. 412 (1978). These purposes include, of course, encouraging workers to litigate bona fide cases of employment discrimination while represented by competent attorneys, all in an endeavor to spur the final dismantling of discriminatory practices in the workplace. *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968).

The Seventh Circuit has not adopted any single approach to Title VII fee awards. All of the Circuit Courts of Appeals which have recently considered these issues have ruled that the most appropriate method of measuring attorney's fees is to calculate the allowable hours worked, and multiply this by a typical hourly billing rate to determine the "lodestar" figure. This lodestar is then subject to upward, or theoretically downward, adjustment based on a number of factors which include but are not limited to the difficulty of the legal issues, the skill of the petitioning attorneys, the quality of their work product, and the time limitations the representation imposed. *Lindy Bros. Builders, Inc. of Philadelphia* v. *American Radiator and Standard Sanitary Corp.*, 487 F.2d 161, 168-69 (3d Cir. 1973) (Lindy I); *Lindy Bros. Builders, Inc. of Philadelphia* v. *American Radiator and Standard Sanitary Corp.*, 540 F.2d 102, 116 (3d Cir. 1976) (Lindy II) (en banc); *Merola* v. *Atlantic Richfield Co.*, 493 F.2d 292 (3d Cir. 1974); *City of Detroit* v. *Grinnell Corp.*, 560 F.2d 1093 (2d Cir. 1977); *Grunin* v. *International House of Pancakes*, 513 F.2d 114 (8th Cir. 1975). The Fifth Circuit adopted a slightly different approach, listing twelve factors they considered important for the trial court to consider. *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

The rulings in these circuits have most recently been adopted in *Copeland* v. *Marshall*, ___ F.2d ___ (D.C. Cir. 1980), a Title VII case. This decision has made it clear that the lodestar method is the preferred method of determining a reasonable attorney's fee. Although the Seventh Circuit has not as yet adopted this approach, nothing in its past decisions would be at odds with this method of calculation. *See Waters* v. *Wisconsin Steel Works of International Harvester Co., supra; Kamberos* v. *GTE Automatic Electric, Inc.*, 603 F.2d 598, 603-04 (7th Cir. 1979). The *Copeland-Lindy* approach has been used by other district courts, including some in this Circuit. *See Jorstad* v. *IDS Realty Trust*, ___ F. Supp. ___ (D. Minn. 1980); *Liebman* v. *J. W. Petersen Coal & Oil Co.*, 63 F.R.D. 684 (N.D. Ill. 1974); *Boggess* v. *Hogan*, 410 F. Supp. 443 (N.D. Ill. 1976).

The contingent fee theory has little to favor it in light of the congressional policies involved. One of these considerations is preventing against recoveries by a private attorney general, e.g. the petitioners, that is "so lucrative as to ridicule the public attorney general." *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d at 719. In this case, a contingent fee recovery has the propensity to create a windfall for the prevailing attorneys when a successful settlement or judgment is reached. While this may be an accepted part of our legal system in some respects, it has no place in statutorily authorized "reasonable fee" cases. This can easily be demonstrated by reference to those situations where the monetary relief is small, but Title VII plaintiffs are reinstated or given other equitable relief. Thus, in *Causey* v. *Ford Motor Co.*, ___ F. Supp. ___ (M.D. Fla. 1976), cited by petitioners, the plaintiffs' back pay award was approximately $2,500 while the attorneys' fees approved were $20,000. In *Copeland, supra*, the plaintiffs received $33,000 in back pay, while the attorneys received $160,000 in fees. Cases where a district court has awarded

a fee by simply taking a percentage of the recovery have become rare, and no examples of such a measurement in a Title VII case has been cited. In light of the judicial attention given attorneys' fees determinations in this decade, particularly the decisions culminating in *Copeland*, such a method cannot be utilized, however appealing its simplicity and ease of calculation. *Technology Fund, Inc.* v. *Kansas City Southern Industries, Inc.*, 72 F.R.D. 433 (N.D. Ill. 1976).

In a normal contingent fee case, payment is taken from the plaintiffs' actual recovery, rather than stacking another cost atop the payments already made by the defendants. The difference in source is only exacerbated when one considers that the plaintiffs here are seeking one-third of the *total recovery, including attorneys' fees.* This method does not result in a reasonable fee, and will not be considered here.

For these reasons, the fee in this case will be calculated by the method utilized in *Copeland* v. *Marshall, supra,* and the other cases previously cited. We believe that this method will effectuate the congressional policies underlying Title VII.

III. *Determining the Chrapliwy Lodestar Amount*

By accepting that the petitioners' attorneys' fees must be calculated by the lodestar method, this Court has created a plethora of issues which must be addressed. We must first determine which of the hours can reasonably be charged to this proceeding and what hourly fees are appropriate. The cases hold that the court is itself an expert on the question of reasonable attorney's fees, and may consider its own knowledge and expertise to form an independent judgment as to the value of time spent on the litigation. *Payne* v. *Travenol Laboratories, Inc.*, 74 F.R.D. 19, 21 (N.D. Miss. 1976).

III A. *Compensable Hours*

Petitioners have submitted time records and requested payment for more than 11,000 hours. In its response, Uniroyal contends that this number of hours should be drastically reduced and cites six different reasons: *First*, and most significant, in terms of the number of hours involved, Uniroyal contends that the petitioners' actions in seeking to have Uniroyal debarred from federal contracts for discriminatory practices are not compensable under the Title VII fee provision. Uniroyal has segregated 2,348.3 hours spent on these proceedings;[2] *Second*, Uniroyal contends that some of the hours petitioners are billing are attributable to its co-defendant, Local Union 65 of the United Rubber Workers, and should not be paid by Uniroyal; *Third*, Uniroyal requests that one-half of the time spent negotiating the final settlement, and its implementation, should not be compensated; *Fourth*, Uniroyal terms as "outrageous" the requested fee for time petitioners have spent as escrow agents for the settlement fund; *Fifth*, Uniroyal contends no payment should be made for time spent preparing the attorneys' fees petition; and *Sixth*, Uniroyal questions the payment of any portion of a fee for petitioners' travel time during the suit. Each of these issues will be discussed in turn.

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[2] Uniroyal's segregation of the hours applicable to each particular topic has been utilized. Unfortunately, such an analysis suffers from a major deficiency. Where the plaintiffs' attorneys' time entry referenced more than one matter, the time involved was divided equally, albeit arbitrarily, between the topics. Despite this, there does not appear to be any satisfactory solution to this problem, other than requiring an expensive and burdensome breakdown of specific time entries. For this reason the Court will use the averaging approach stated above.

1. *Debarment Procedures*

Uniroyal contends that the petitioners should not be reimbursed for the hours spent pursuing the debarment of Uniroyal from federal contracts. Uniroyal has admitted that had the government not barred Uniroyal from government contracts, they would not have settled this suit. Attorney Kalish, Uniroyal's chief negotiator, stated, in an affidavit attached to Uniroyal's brief: "It was definitely the loss of government contracts which forced Uniroyal to settle." Therefore, Uniroyal is in the somewhat incongruous position of contending that the hours petitioners spent prodding and harassing the federal bureaucracy into action, which actually led to the settlement, should not be compensated. However, as a matter of law, the plaintiffs' attorneys cannot be reimbursed for these hours.

Several reasons dictate this decision, but, most importantly, the remedies of Title VII did not require nor encourage the plaintiffs to seek Uniroyal's contract debarment. The Title VII remedy existed at all times, and could have been utilized to bring Uniroyal to a settlement or judgment. In this case, the collateral proceedings may have been the proximate cause of the success achieved by the plaintiffs. Success alone, however, does not legitimize a request for fees regarding procedures that were not contemplated under Title VII's attorney's fee provisions. This is made amply clear by the wording of the attorney's fee statute and the cases which have interpreted it. Section 706(k) (42 U.S.C. § 2000(e)—5(k)) provides:

> In any action or proceedings *under this subchapter*, the court, in its discretion, may allow the prevailing party, . . . a reasonable attorney's fee as part of the costs." (emphasis added).

This section requires that the attorney's times and efforts be mandated by the Title VII statute, or by related

and required procedures. The emphasized language makes it clear that the attorney's time must be within the Title VII procedure. The Executive Order utilized here cannot be transformed by legal alchemistry into such a proceeding.

The reach of the Title VII attorney fee provision was recently examined by the Supreme Court in *New York Gaslight Club, Inc.* v. *Carey*, ____ U.S. ____, 100 S.Ct. 2024 (1980). *Carey* did not reach the issue in this case, i.e., whether collateral proceedings with the same goal orientation, but not provided for under Title VII, can be compensated. *Carey* does, however, give a clear indication of just how far the Title VII attorney's fee provision can be stretched. In *Carey*, the Court sanctioned plaintiffs' attorneys' fees for all related state or other administrative proceedings, including any hearing before the Equal Employment Opportunity Commission (EEOC), or state and local agencies. In that case, the initial charge of discrimination was made to the EEOC, which then deferred action, referring the matter to the proper state administrative agency, a deferral required by Section 706(c). The EEOC eventually issued a right to sue letter, and a suit was filed in federal court, but it was voluntarily dismissed except for the attorney fee petition when a satisfactory settlement was achieved in the required state proceedings. The Court approved the payment of fees for those proceedings, noting:

> It is clear from this scheme of interrelated and complementary state and federal enforcement that Congress viewed proceedings before the EEOC and in federal court as supplements to available state remedies for employment discrimination. Initial resort to state and local remedies is mandated, and recourse to the federal forums is appropriate only when the State does not provide prompt or complete relief. See *Alexander* v. *Gardner-Denver Co.*, 415 U.S. at 48-50, 94 S.Ct., at 1019-21.

100 S.Ct. at 2031.

The various lawsuits filed in addition to the parent *Chrapliwy* v. *Uniroyal* claim are simply *not mandatory procedures.* Although the EEOC and Title VII do reflect the same goal orientation as the OFCCP and Executive Order No. 11246, i.e., ending discrimination in the work place, the two cannot be fused into one overarching mechanism. The OFCCP is charged with administering the contract compliance program, while the EEOC enforces Title VII. *Emerson Electric Co.* v. *Schlesinger,* 609 F.2d 898 (8th Cir. 1979). Although these agencies are allowed to cooperate and exchange information, their duties are distinct.

Furthermore, those cases which have addressed the issue have not found a private right of action implied by the Executive Orders pertaining to the discrimination area. *Farmer* v. *Philadelphia Electric Co.,* 329 F.2d 3, 8-9 (3d Cir. 1964); *Farkas* v. *Texas Instrument, Inc.,* 375 F.2d 629, 633 (5th Cir. 1967). Although those cases did not discuss Executive Order 11246, the predecessor of this Order was considered. The gist of those holdings is that the Executive Orders are to be enforced by government administration, not private civil actions.

The court is aware that in this case the government agencies responsible for enforcing the Executive Order were slow in performing their statutory function. While they may perform more satisfactorily in the future, that is arguably a result of this litigation. As a product of the plaintiffs' determined prodding, a new OFCCP staff has been established to enforce Executive Order 11246 and this will be taken into account when the subjective quality adjustment is being considered.

Aside from the nature of the Executive Order, it would be inappropriate to charge Uniroyal attorney fees for cases to which they were not a party, or cases wherein the plain-

tiffs did not formally intervene. Uniroyal was not a party to *Chrapliwy* v. *Dunlop*, except for a very limited amount of time, nor in *Chrapliwy* v. *Marshall*. Likewise the plaintiffs were not a party to *Uniroyal* v. *Marshall*.

The steps plaintiffs took to seek Uniroyal's debarment were not unreasonable nor undesirable. This court scrupulously upheld the plaintiffs' right to make such an effort, characterizing it as follows:

> /B/y writing to the Federal agencies to inform them of alleged discriminatory practices in violation of Executive Order No. 11246, and by seeking an order to compel the appropriate agencies to bring Uniroyal's alleged discriminatory employment practices into compliance with Executive Order 11246, the plaintiffs' attorneys have attempted to diligently pursue a second available means of redress for their clients. Since Uniroyal engages in interstate commerce and receives Federal Government contracts, plaintiffs' attorneys have the statutory right to simultaneously pursue remedies under 42 U.S.C. 2000e et al., and Executive Order 11246. *Contractor's Assn.* v. *Secretary of Labor*, 442 F.2d 159 (3d Cir. 1971).
>
> Moreover, the attempts of the plaintiffs' attorneys to secure relief for an alleged violation of Executive Order No. 11246 are protected by the First Amendment right to "petition the Government for a redress of grievances".

This does not, however, give this Court the equitable power to require the payment of attorneys' fees for these efforts. The *Carey* holding and language of Section 706(k) circumscribe the district court's ability to award payment for these hours. The Executive Order itself does not contain a private right of action nor, of course, any attorney's fee provision. Therefore plaintiffs' attorneys will not be compensated for these hours which were attributed to the debarment proceedings.

2. *Time Attributed to Union Liability*

Uniroyal contends that 265 hours of the time for which petitioners seek compensation should be charged to the defendant unions involved, Local Union No. 65 of the Rubber Workers and the parent International organization. The status of these defendants has not as yet been settled, and they did not contribute anything to the settlement fund which the plaintiff class received. The petitioners contend that they have removed all time entries that specifically relate to the Union's liability, and have billed only those hours which contributed to the case against Uniroyal. The record is clear that petitioners' discovery of materials controlled by the Union did have direct impact on this case, and contributed in establishing Uniroyal's liability. *Chrapliwy* v. *Uniroyal, supra,* 6 FEP Cases at 100. After reviewing these time entries, however, the Court finds that the majority do not pertain to Uniroyal's liability, but, rather, refer to Union defenses and Union liability. The Union must bear its share of the costs involved in this lawsuit, and inasmuch as the Union's liability and status have not as yet been determined, these costs cannot now be shifted to Uniroyal. Where a collective bargaining agreement violates Title VII, the costs of rectifying the discrimination should be shared by the employer and union. *Johnson* v. *Goodyear Tire & Rubber Co.,* 491 F.2d 1364, 1381-82 (5th Cir. 1974). Similarly, it is even clearer that the costs of litigation should be apportioned to the parties in a case which establishes a Title VII violation.

3. *Time Attributable to Settlement Negotiations and Approval and Implementation of Settlement*

Petitioners seek compensation for 1,138 hours relating to the settlement negotiations, and 856.5 hours for the approval and implementation of the settlement with Uniroyal,

with the representative plaintiffs, and with the Department of Labor. Uniroyal's sole contention is that the Government's claims were so inextricably linked to the plaintiffs' case that 50% of the negotiations were devoted to each set of claims, and, therefore, one-half of the time the petitioning attorneys spent should be excluded from compensation.

Uniroyal's position in this matter is without merit. It was Uniroyal's litigation strategy which placed the defendant in the unenviable position of having to settle in the eleventh hour contract debarment proceedings. Uniroyal cannot allocate petitioners' hours to the Department of Labor's monitoring and approval power. Uniroyal placed itself in a position where the settlement not only had to be satisfactory to the plaintiffs but to the Government as well. If attorney fees were incurred because of this linkage, the burden cannot be shifted to the petitioners.

The settlement negotiations are of a different nature than the hours spent on the debarment proceedings. These hours were expended in a direct attempt to resolve the Title VII lawsuit, and, for this reason they will be fully compensated.

4. *Payment for Time Spent as Escrow Agent*

The plaintiffs' lead attorney was appointed as escrow agent for the cash settlement fund which was paid directly to each plaintiff. Plaintiffs' attorneys carried out this task, distributing almost the entire $5,000,000 cash fund within six weeks of Uniroyal's final settlement payment. As part of the payout, petitioners were required to negotiate with the various taxing authorities in order to withhold the proper amount of taxes from the payments to the class members. The plaintiffs' attorneys request payment for 129.9 hours for these services. Defendant points out that the agreement of settlement provides that the escrow agent "shall serve without compensation," and claims the petitioners' request for fees is in direct contradiction with the agreement of the

parties. Defendant's position is that petitioners merely volunteered their time and should not be compensated for these hours.

The services of the petitioners, in administering and distributing the settlement fund, mixed their duties as attorneys and as escrow agent. The time spent necessarily benefited the plaintiff class in duties that had to be performed. While the escrow agent was not to be paid, the agreement cannot be taken out of context as the defendant urges to deny compensation to the petitioners. While they were not paid as escrow agents, the substance of this agreement does not preclude the petitioners being paid as attorneys for the necessary services rendered. They should be compensated for time spent upon these duties.

5. *Preparation of the Attorney's Fee Petition*

Petitioners request compensation for 581 hours devoted to preparing this fee application and supporting documentation. Defendant contends that no fee, or a reduced fee, should be paid. Payment for time spent preparing an attorney's fee application was recently approved by the Seventh Circuit in *Bond* v. *Stanton*, ___ F.2d ___ (7th Cir. 1980). Although that decision was based upon the Civil Rights Attorney's Fee Award Act of 1976, 42 U.S.C. § 1988, its reasoning is dispositive of the issue here.

Other Circuit Courts of Appeals which have considered this issue have reached similar results with respect to both Title VII and other Civil Rights Act Attorney's fee statutes.[3] It reflects the congressional intent that plaintiffs

[3] *Johnson* v. *State of Mississippi*, 606 F.2d 635, 638 (5th Cir. 1979); *Gagne* v. *Maher*, 594 F.2d 336, 343-44 (2d Cir. 1979), *aff'd*, ___ U.S. ___, 100 S.Ct. 2570 (1980); *Weisenberger* v. *Huecker*, 593 F.2d 49, 53-54 (6th Cir.), *cert denied*, ___ U.S. ___, 100 S.Ct. 170 (1979); *Lund* v. *Affleck*, 587 F.2d 75, 77 (1st Cir. 1978); *Prandini* v. *National Tea Co.*, 585 F.2d 47, 53 (3d Cir. 1978).

have the counsel of attorneys to vindicate their rights, and to encourage attorneys to accept these cases. The work product of these hours is very helpful in assisting district courts to an informed determination of what are "reasonable fees." The petitioners' extensive briefs and appendices, as well as the defendant's response, have been very helpful in clarifying the numerous legal issues here involved. In light of *Bond* v. *Stanton*, there is no doubt these hours were reasonably spent and should be fully compensated.

6. *Travel Time*

Petitioners have requested payment for 558.70 hours travel time, of which 316.45 pertain directly to the *Chrapliwy* case. Defendant contends that no payment for these hours of travel should be made, relying upon *N.A.A.C.P.* v. *Bell*, 448 F. Supp. 1164, 1168 (D.D.C. 1978), *rev'd on other grounds*, 609 F.2d 514 (1979). That case does not put forward any reason or authority to deny hourly compensation for time spent traveling.[4] The defendant also advances an alternative line of argument, contending that travel fees, if awarded, should be substantially reduced. In *Keyes* v. *School District No. 1, Denver, Colo.*, 439 F. Supp. 393, 409 (D. Colo. 1977), a school desegregation case, the court awarded travel time of only one-half the approved hourly rate, while in *McPherson* v. *School District No. 186*, 463 F. Supp. 749 (S.D. Ill. 1978), the award was two-thirds of the approved hourly rate. In view of the clearly articulated congressional policy of enabling plaintiffs to obtain capable legal counsel, it is appropriate to compensate petitioners at their usual hourly rates for travel time. This recognizes the reality that this time is valuable, even if an attorney cannot be totally productive while traveling. It will allow attorneys of special skill in

[4] It does provide authority for a substantial hourly rate of $100.00 per hour for nontravel hours.

managing Title VII litigation to provide their skills in areas not within their immediate geographical reach.

7. *Additional Hours*

The petitioners request payment for 565 additional hours allegedly devoted to the case since April 30, 1980, when the original time records were submitted to this Court. This time is related to the following issues:

(1) a reply brief on the attorney's fee issue as well as final preparation of the fee application.

(2) a dispute regarding pension benefits ultimately settled by agreement of the parties.

(3) a dispute as to the proper incidence of taxation relating to settlement monies which was decided by the Court.

(4) routine administration of the settlement.

While these hours are reasonably related to the case, compensation for these additional hours will be computed at the lower rate of $60.00 per hour.

III B. *Reasonable Hourly Rate*

To determine attorneys' fees under the *Copeland* formula, the Court must determine the reasonable hourly fee to be charged for each of the plaintiffs' attorneys. Plaintiffs contend that their New York counsel has an hourly billing rate of $200 per hour, their *Washington, D.C. lead counsel, $175 per hour,* while their two local counsel bill at $70 and $60 per hour, respectively. The seven other attorneys who assisted in this litigation claim hourly rates ranging from $50 to $175 per hour. Petitioners seek to have the lodestar figure computed by multiplying these hourly rates against the number of compensable hours. They contend that 1980 billing rates should be used since that will protect their

income from the inflation which has occurred since 1973. Uniroyal, however, contends that these rates should reflect the fees charged at the time that the hours were worked.

1. *Locality billing rate or rate charged by the attorney*

Defendant contends that the hourly payment to petitioners must conform to the customary rate in the South Bend area, not the fees charged in Washington or New York. Uniroyal's affidavits with regard to South Bend rates indicate that attorneys' fees ranged from a low of $35 per hour in 1973 to $85 per hour in 1980, depending, of course, upon the skill of the attorney involved.

Before considering the case law in this area, it should be noted that defendant has engaged similarly skilled and expensive counsel to represent its interests in this suit. Defendant has employed four major, nationally recognized, law firms, and forty-five attorneys in its spirited defense, for a total of 10,963 hours billed through July 22, 1980.[5] Uniroyal had its own $175 and $200 per hour attorneys, as well as $75 and $100 per hour attorneys, according to the 1980 billing rates. Presumably, these fees were received on a regular basis, without risk of nonpayment. On the other hand petitioners were not paid anything until this litigation was settled, and they might conceivably have come away with empty hands. Because of the overwhelming evidence of sex discrimination as practiced by Uniroyal, we do not consider plaintiffs' risk of failure, and the consequent loss of fees to petitioners, to have been very great. This will be more fully taken into account when the Court considers the subjective aspects of the *Copeland* and *Waters* formulas, and deals with the contingency risk issue. More significantly at this juncture, the factual data indicates that

[5] Ascertained by answers to interrogatories propounded by plaintiffs' counsel.

the defendant's attorneys billed Uniroyal at hourly rates roughly comparable to the hourly wage sought here by these petitioners.

The congressional intent in allowing attorney's fees was, in part, to encourage individuals injured by discrimination to seek judicial review and to deter discrimination. Congress recognized, however, that this system would work only if the fee provided an incentive for competent lawyers to undertake such employment and to receive adequate compensation for the time they expend. *Piggie Park, supra,* 390 U.S. at 402.[6]

This policy was also discussed in *Johnson* v. *Georgia Highway Express, Inc., supra,* 488 F.2d at 719-20, which stated:

> The statute was not passed for the benefit of attorneys but to enable litigants to obtain competent counsel worthy of a contest with the caliber of counsel available to their opposition and to fairly place the economical burden of Title VII litigation. Adequate compensation is necessary, however, to enable an attorney to serve his client effectively and to preserve the integrity and independence of the profession.

The caliber of counsel here was equally matched. This is not the case of a small, relatively unsophisticated corporate defendant, suddenly faced with high priced counsel running up the clock at an exhorbitant hourly rate. The rate on both sides reflects the price talented lawyers can command. It would not advance the congressional policies as interpreted

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[6] *See also Copeland,* ___ F.2d ___, slip op. at 19. The Civil Rights Attorney's Fee Award Bill of 1976, which is similar in language and principle to the attorney's fee provisions of Title VII also have recognized this. See *Copeland, supra,* at 33 and the dissent, footnotes 20-22 with citation to the House of Representatives and Senate Reports on the multiple purposes of the attorney's fees provisions.

by *Piggie Park, supra,* or *Johnson* v. *Georgia Highway Express, supra,* to arbitrarily limit plaintiffs' attorneys to the local billing rate when the defendant has utilized the resources of equally expensive, and presumably equally talented, attorneys. If Uniroyal had primarily used local counsel in its defense, it would have a far better argument in favor of restricting petitioners to the local billing rate. The plaintiffs' attorneys' billing rate must, of course, be balanced against the local billing rate to achieve the reasonable rate required by the statute. The legal profession no longer operates in a strictly local product market, and the attorney's fee provision of Title VII cannot be utilized to unrealistically tie the fees paid to the locality's wage scale.

The case law reflects the split between the two methods of calculating the hourly rate: local billing rates versus the attorney's usual billing rate. In *City of Detroit* v. *Grinnell Corp., supra,* 560 F.2d at 1102, the court allowed attorney fees of $125 and $100 per hour, stating:

> An award in such amount is not to be bestowed upon a lawyer representing a class simply on the basis of his having earned entrance into the legal profession. This should especially be avoided when such an amount becomes the foundation for superimposing fees of double and treble the "reasonable" amount, with the result becoming quite unreasonable.

In *Arenson* v. *Board of Trade of City of Chicago,* 372 F. Supp. 1349 (N.D. Ill. 1974), the court allowed hourly fees ranging from $65 to $125 per hour, although the multiplier that was used raised these rates to $240 and $358 per hour.

In *Technology Fund, Inc.* v. *Kansas City Southern Industries, Inc., supra,* Judge Will allowed an hourly rate of $150 for the most senior partner appearing on behalf of the plaintiffs. This rate was justified due to the prominence and skill of the attorney involved. Judge Will also based his

decision on the rates that lawyers routinely billed their clients.

Defendant cites several cases to support the position that hourly rates must be determined in accordance with the hourly rate charged for similar services in the locality where the cause is heard. This is one of the factors set out by the Seventh Circuit in *Waters* v. *Wisconsin Steel, supra,* as well as *Johnson* v. *Georgia Highway Express, Inc., supra.* Neither case does more than mention this as one of the dozen factors to be considered, and neither instructs as to what should be done when a "specialist" from Washington or New York, with much higher fixed cost than local counsel, enters the case.

Defendant's position receives some support from the decision in *McPherson* v. *School District #186, supra,* a case falling within the ambit of the Civil Rights Attorney's Fee Award Act. The Court began its analysis by acknowledging that there was no guidance from other decisions as to whether a national or local average should be used. The case was tried in Springfield, Illinois, while the successful plaintiff's counsel from Milwaukee and a consulting attorney from New York sought $100 per hour fees. Judge Ackerman rejected the New York rates in part, using Springfield's average as a base fee, and adjusting the rate upward depending on the skill and standing of the attorney involved. While $50 an hour was the rate for skilled attorneys in Springfield, fees of $60 per hour were granted for the New York attorneys.

In *Keyes* v. *School Dist. No. 1, supra,* the district court reduced the hourly rate claimed by a prominent Denver firm that enjoyed substantially higher billing rates than the area average. In *Payne* v. *Travenol Laboratories, Inc., supra,* the local billing rate was $35 per hour, and this figure was paid despite the $100 per hour billing rate of

the plaintiff's lead counsel. These cases indicate that some balancing is required between the rate requested by the plaintiff's and the defendant's position.

2. *Present or Historical Billing Rates*

One additional problem has already been raised—i.e., should the hourly wages be paid at the billing rates that prevailed in 1972 or 1973 as defendant contends, or should the petitioners be paid at their 1980 billing rates to offset the inflation which has increased the price levels in effect six and seven years ago.

Petitioners point out that the Consumer Price Index for October, 1972, when this litigation began, was 126.6. In July, 1980, it was 248, indicating a consumer price increase of 95% in the last eight years, a fact of life of which everyone is painfully aware. Several large class action cases support petitioners' contention that current billing rates should be utilized to provide an equitable result.

In *Copeland, supra,* the Court stated:

> Court-awarded fees normally are received long after the legal services are rendered. That delay can present cash-flow problems for the attorneys. In any event, payment today for services rendered long in the past deprives the eventual recipient of the value of the use of the money in the meantime, which use, particularly in an inflationary era, is valuable. A percentage and adjustment to reflect the delay in receipt of payment therefore may be appropriate. Lindy II, 540 F.2d at 117.[23]

___ F.2d at ___.

[23] On the other hand, if the "lodestar" itself is based on present hourly rates, rather than the lesser rates applicable to the time period in which the services were rendered, the harm resulting from delay in payment may be largely reduced or eliminated.

Other cases support the proposition that present billing rates should be used. In *In Re Ampicillin Antritrust Litigation*, 81 F.R.D. 395, 402 (D.D.C. 1978), the Court stated:

> The rates used are based upon current normal rates, despite the fact that the services were provided over an eight-year period. This use of current rates simplifies the Court's task and roughly counter-balances the inflationary loss suffered by the attorneys because of the long delay in the recovery of their fees.

In another protracted lawsuit, which took seven years to complete, current billing rates were used. *City of New York* v. *Darling-Delaware*, 440 F. Supp. 1132, 1134 (S.D. N.Y. 1977). The court stated: "Where the attorneys have waited so long for any compensation, it seems that a calculation at present rates is appropriate to compensate for loss of interest or inflation."

On the other hand, some district courts have used the historical rates at which attorneys had billed in the past, rather than present billing rates. *Imprisoned Citizens Union* v. *Shapp*, 473 F. Supp. 1017 (E.D. Pa. 1979). While others have used the historical rates, they have then increased the contingency multiplier to reflect the lower value resulting from the historic rates. *In Re Equity Funding Corp. of America Securities*, 438 F. Supp. 1303, 1331 (D.C. Cal. 1977) (case lasted four years); following *Lindy Bros. Builders, Inc.* v. *American Radiator and Standard Sanitary Corp.*, 540 F.2d 102, 117 (3d Cir. 1976); *Weiss* v. *Drew National Corp.*, 465 F. Supp. 548, 552 (S.D. N.Y. 1979). In *Aamco Automatic Transmissions* v. *Tayloe*, 82 F.R.D. 405 (E.D. Pa. 1979), historic billing rates were used, but the court awarded a modest "bonus" to compensate for the long delay in obtaining payment. Policy considerations indicate that to the extent historical rates were based on costs of overhead and services paid for at the time, ad-

justment by using current billing rates could result in a windfall for plaintiff's attorneys. A. Miller, Attorney's Fees in Class Actions (Federal Judicial Center 1980).

All of the varied policy concerns discussed must be taken into account during a period of escalating inflationary pressures. It should be recognized that the higher current rates reflect the considerable increase that inflation has wrought over the eight-year period involved in this long case, an increase that has accelerated during the final months since the debarment proceeding prodded Uniroyal to accept a final settlement in this case.

As stated above, the district court in *In Re Ampicillin Anti-Trust Litigation, supra,* indicated three years ago that the use of what were then current normal rates "roughly counterbalances the inflationary loss suffered by the attorneys because of the long delay in the recovery of their fees." 81 F.R.D. at 402. The *Copeland* court also recognized that fact. This is very heavily impressed upon the Court as we weigh the several factors discussed above.

Administratively, the Court would be hard pressed to assess the proper hourly rate the attorneys of differing skills and experience should be paid for their work during each of the eight years this litigation continued. The various rates the Court has adopted reflect the interrelationship of the lodestar analysis. If current rates were not used, the amount awarded for the subjective risk and quality factors would have been greatly increased. For all these reasons, the use of *current billing rates will be utilized.*

Attorney	Rate Requested	Defendants Proposed	Rate Allowed	Hours Requested	Hours to be Compensated	Lodestar Figure
Ewald	$175	$60-$85	$75	6,324.8	4,552.7	$341,452.50
Blumrosen	200	60	75	427.2	248.1	18,607.50
Fette	70	60	50	2,844.5	2,562.4	128,120.00
Mick	60	60	50	1,086.3	1,008.8	50,440.00
Frum	110	60	50	301	41.4	2,070.00
Seymour	175	60	75	48.5	43.4	3,255.00
Ginsburg	125	60		29.7	0	
Ryan	80	40	50	31.5	31.5	1,575.00
Bent	50	50	50	40.6	40.6	2,030.00
Gautier	50	50	50	25.5	25.5	1,275.00
Passaro			50	19.2	19.2	960.00
Sub-Total				11,178.8	8,573.6	549,785.00
Additional Hours since 5/1/80			$60	565.	565.	33,894.00
Total						$583,679.00

IV. *Subjective Considerations for Adjusting the Lodestar Figure*

A concomitant of rejecting the petitioners' contingent fee theory is an acceptance that the "lodestar" figure arrived at by multiplying hours times rate, may be adjusted upward or downward based on the more subjective criteria announced in *Waters, supra.* For example, in *Kamberos* v. *GTE Automatic Elec., Inc., supra,* the court approved a twenty-five per cent increase of the lodestar figure in a routine Title II action.

The court in *Jorstad* v. *IDS Realty Trust, supra,* adopted the subjective considerations expressed in *Lindy Brothers, supra,* which included two broad categories: the risk of non-recovery, and quality of the attorney's work, and awarded specific dollar amounts for each of these categories.[7] Each of these cases dealt with securities violations. The Seventh Circuit has indicated in a previous Title VII case that a decision on attorney fees should take into account all of the factors in the ABA Code of Professional Responsibility, Disciplinary Rule 2-106. *Waters* v. *Wisconsin Steel Works of Int. Harvester Co., supra,* 502 F.2d at 1322. Some of these Rule 2-106 factors overlap, and each factor can be allocated to either the risk or the quality issues. For this reason the Court will briefly state the findings of fact with respect to each of the applicable *Waters* factors, and award the appropriate adjustments to

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[7] The court awarded $800,000 for the risk factors, and $800,000 for the quality of the work performed on the merits of the case. The base fee for hours spent on the merits totaled $545,609.50. The hourly rate the attorneys were paid ranged from $125 to $60 per hour. In addition, fees of $226,558 were granted for time spent on the fee application, with a further $225,000 paid for the risk factor in the attorneys' fee application. The sum of the fee award was $2,597,167.75, with an additional $124,482.65 in expenses being paid.

the lodestar figure on the basis of the risk involved, and the quality of the representation provided by the petitioners.

In assessing the risk of non-recovery and the quality factor, the hours reasonably spent on the case after the settlement are not taken into account. Those hours were not at risk, and were fully compensated for by the payment of the regular hourly wage. For this reason the total number of hours worked under the risk of non-recovery is approximately 7,300 hours.

A. *The Risk of Non-Recovery*

The award must take into account that some of these cases are lost. As stated in *McKittrick* v. *Gardner*, 378 F.2d 873, 875 (4th Cir. 1967):

> The effective lawyer will not win all of his cases, and any determination of the reasonableness of his fees in those cases in which his client prevails must take account of the lawyer's risk of receiving nothing for his services. Charges on the basis of a minimal hourly rate are surely inappropriate for a lawyer who has performed creditably when payment of any fee is so uncertain.

See also, Dolglow v. *Anderson*, 43 F.R.D. 472, 494 (E.D.N.Y. 1968).

Uniroyal argues that no contingency risk of non-recovery existed after the July, 1973 partial summary judgment in favor of the plaintiffs. The history of this litigation, however, indicates that this contention is without merit. Uniroyal did not surrender after the 1973 summary judgment, nor after any further order building upon that finding of liability, but, rather, continued to file motions attacking this Court's jurisdiction, asserted novel business defenses, and at one point sought sanctions against the petitioners as well as dismissal of this suit. No ground was surrendered

without a struggle, and Uniroyal litigated each issue in this case until the debarment proceeding commanded a final settlement. However, Uniroyal's violation of the sex discrimination laws might suggest that no real risk of non-recovery ever existed here.

As Judge Rubin noted in *Perkins* v. *New Orleans Athletic Club*, 429 F. Supp. 661, 667 (E.D. La. 1976): "Those who elect a militant defense in the face of a statute allowing attorney's fees if they are defeated must take into account the time and effort they exact from their opponents." It was Uniroyal's right to contest every aspect of this claim, but they cannot now disclaim the consequences of their actions.

Uniroyal relies upon several cases wherein plaintiffs' attorneys were virtually assured of being paid for their efforts in the litigation. A comparison of the facts in these cases with this litigation shows how inappropriate such an analogy would be. For example, in *Northcross* v. *Board of Education of Memphis City Schools*, 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 100 S.Ct. 2999-3000 (1980), the decision not only noted that the legal issues were not novel, but stated: "[W]e do not believe there was a very fair chance that the plaintiffs would wholly fail to prevail." In *City of Detroit* v. *Grinnell, supra*, the plaintiffs filed suit after the government had already succeeded in proving an antitrust violation. The government's findings of fact and conclusions of law were incorporated in the class complaint. It is not surprising that these circumstances led the appellate court to reduce the threefold multiplication of the lodestar figure. In contrast, these Chrapliwy plaintiffs supplied the government with the raw materials of its case in this litigation. Unlike *Northcross* or *Grinnell* where only a portion of the time spent in the case was taken under the risk of non-recovery, Uniroyal's tenacious and skilled

defense of its position always left an element of doubt as to the conclusion of this litigation, despite the discrimination which occurred. This is supported by Uniroyal's affidavits, which indicate that this suit was settled only because of the threatened federal debarment. The entire suit was conducted with some risk of non-recovery until the settlement was reached in October, 1979.

1. *The Novelty and Difficulty of the Legal Questions Involved and the Skills Exhibited in the Resolution of these Problems*

Another portion of the overall risk of non-recovery is an assessment of the difficulty of the legal and factual issues the petitioners faced and how they were overcome. Uniroyal contested every aspect of this lawsuit, from discovery disclosures to the substantive law of fair employment practices. The company's stubborn defense forced the plaintiffs into strenuous efforts to advance their case. From the viewpoint of judicial economy, the petitioners utilized an extremely economical method of proof, relying upon well documented and carefully detailed requests for admissions and interrogatories. This avoided a burdensome trial using these materials, which would have been difficult to manage, time consuming, and due to the staggering volume of material, possibly unintelligible. This somewhat plodding but certain method of proof saw the plaintiffs prevail each time summary judgment was requested, despite Uniroyal's vigorous defense.

Managing a large class action is never an easy task, but maintenance of this class action was difficult, and required the constant attention of the petitioners. The length of time the suit was pending, combined with the continual rumors of Uniroyal's demise, led to "opt outs" by members of the plaintiffs' class. The issue of settling class membership was heavily litigated, with Uniroyal's contention that

continued opt outs be allowed finally being settled by the Court.

In February, 1976, Uniroyal sought dismissal of this case and contempt sanctions against the plaintiffs and their attorneys, claiming that these petitioners had violated this Court's order restricting communications with the plaintiff class, and, further, had violated the ABA's Code of Professional Responsibility. Both issues were resolved against Uniroyal. *Chrapliwy* v. *Uniroyal*, 71 F.R.D. 461, 12 FEP Cases 1664 (N.D. Ind. 1976).

In summary, it is clear that had the petitioners faltered in any respect with the difficult legal issues faced, they could have lost their case, or have been placed in a much weaker position for settling the claim.

2. *Time Limitations Imposed by the Litigation*

There must have been periods during the past seven years when the petitioners could have done nothing but work on *Chrapliwy* and its progeny. These periods include October and November of 1972, when the plaintiffs began preliminary investigations with the ninety day EEOC statute of limitations requiring quick action; the period proceeding the discovery deadline of June 1, 1974; the period immediately prior to the filing of each summary judgment motion; and the final months of this litigation, from June till October, 1980. These time limitations circumscribed the practice of the attorneys in this case, although this restriction is offset by the fact that the plaintiffs will now be paid for these hours.

Defendant contends that *Kamberos* v. *GTE Automatic Electric, Inc., supra*, is authority for rejecting any claim for increased compensation based on time limitations. That case is inapposite. The attorneys in that case worked 268

hours over a *six* year period, indicating that there were no "time limits" imposed on the petitioners' practice. As these findings indicate, that is not the situation faced here.

B. *Quality*

1. *The Experience, Reputation and Ability of the Lawyers Performing Services*

In deciding attorney's fee awards, other courts have considered the experience, reputation and ability of the lawyers.

Waters v. *Wisconsin Steel Works of International Harvester Co., supra; Johnson* v. *Georgia Highway Express, Inc., supra; Arenson* v. *Board of Trade of City of Chicago, supra; Jorstad* v. *IDS Realty Trust, supra.*

These criteria have, to some degree, been computed in the hourly rate since a skilled and experienced attorney commands a higher hourly rate than a neophyte who lacks trial experience. *Wehr* v. *Burroughs,* 22 FEP 982, 987 (E.D. Pa. 1979). With this caveat in mind, there are some comments that should be made on the quality aspect of the attorneys' involvement.

Overall, the petitioners brought to this litigation a more than adequate command of trial advocacy techniques, particularly those required to manage a large Title VII action. It is not necessary to discuss each lawyer who took part and state his past experience and the skills exhibited here. It is sufficient to state that the petitioners who were not drawn from this area had a strong background in fair employment litigation, particularly in Title VII cases. The local counsel, from Michigan and Indiana, also brought a record of trial experience to the plaintiffs' team, and exhibited these skills, while assisting in the difficult job of managing this lawsuit.

The ability of these attorneys is further demonstrated by their success when opposed by talented, nationally recognized law firms. Uniroyal utilized a leading local law firm, one of the nation's noted management-industrial relations firms, corporate counsel, and other skilled negotiators on its behalf. From this, the Court concludes that the level of experience, reputation, and ability of the attorneys supports some upward adjustment of the "quality" aspect of this fee award.

2. *Results Obtained*

Any inquiry into the quality of the representation must take into account the fourth factor enumerated in *Waters* v. *Wisconsin Steel Works of International Harvester Co.*, *supra*, the amount involved and the results obtained.

In *Swanson* v. *American Consumer Industries, Inc.*, 517 F.2d 555, 563 (7th Cir. 1975), the court stated:

> The amount that an attorney can expect to receive as a fee for prosecuting a case . . . is necessarily related . . . to the amount actually recovered. It is also related in some degree to the amount that could realistically have been hoped to be recovered.

Accord, Williams v. *General Foods Corp.*, 492 F.2d 399, 409 (7th Cir. 1974).

In this case, the amount recovered must also take into account the equitable relief obtained. In *Copeland*, it was stated:

> It is important again to emphasize that a huge dollar recovery does not itself justify a huge fee award. The "lodestar" itself generally compensates lawyers adequately for their time. An upward adjustment for quality is appropriate only when the attorney performed exceptionally well, or obtained an exceptional result for the client. For example, if a substantial monetary judgment was to be *expected*, that expectation normally is

> reflected in the hourly rate used to compute the "lodestar," and no further adjustment would be necessary.

23 FEP Cases at 976 (emphasis in original.)

Acknowledging the results obtained would not be complete without recognizing the impact of this lawsuit on the Department of Labor. The actions by the plaintiffs' attorneys forced the Labor Department to create a working enforcement system to implement Executive Order 11246, and police other federal contractors in their compliance with its procedures. This mechanism will continue to operate, vindicating the rights of other employees and effectuating the congressional intent behind both Title VII and the Executive Order.

The magnitude of the financial recovery is not a determinative factor, merely one to be considered by the Court. The large amounts involved do not add to the complexity of the problems, increase the responsibilities or require greater capabilities of counsel. Petitioners request $1.5 million as the proper quality adjustment. They justified this figure by contending that their hourly rate multiplied by the number of hours is approximately $1.5 million. The petitioners also suggest that if the court is unpersuaded by that contention, the smallest quality adjustment should be $475,800, a figure calculated by taking 10% of the immediate cash recovery obtained, $4,758,000. Defendant Uniroyal contends that no quality adjustment should be paid. They argue that the government, not the petitioners, forced the large settlement.

CONCLUSIONS

For the reasons previously stated, and in light of the Court's evaluation of the proper hourly rate and compensable hours, the Court now awards the following amounts: For the overall risk of non-recovery, $50,000, and for the quality of the representation, $200,000. These amounts will be added to the lodestar figure of $583,679 established in Part III of this order, for a total of $833,679. A total fee which we believe is reasonable in light of all the factors involved.

Borrowing from Judge Bauer in *Arenson* v. *Board of Trade of City of Chicago, supra,* at 1359, this award, "is meant to adequately compensate them for initiating this significant litigation and negotiating such a beneficial settlement . . . ; yet . . . this award is not meant to provide a windfall to the plaintiffs' attorneys."

At the hearing on attorneys' fees, the petitioners' lead counsel advised the Court that payment of this fee could be made in a lump sum to all of the attorneys involved. With this in mind, the Court's breakdown of the fees may be considered advisory, and final distribution is left to the discretion of the attorneys involved.

One final note is required before closing. Defendant Uniroyal requested and was granted three months' additional time to answer the petition for fees. When the hearing was held on this application, it was obvious that sorting out the legal theories and facts involved would take a substantial amount of time, even if this decision is not appealed. Defendant Uniroyal has admitted liability for fees of at least $290,000, and, at a hearing on the matter of these fees, counsel for defendant accepted the Court's suggestion that an interim payment of $300,000 be made at that time to the petitioners. That payment was made, without any prejudice

to Uniroyal's rights in this matter, and that sum of $300,000 should be set off against the total amount of fees herein awarded the attorneys for plaintiffs. After credit is given for that interim payment of $300,000, the net amount now due petitioners is $533,679. Judgment will be entered for that amount.

So ordered.

ENTER: March 6, 1981.

ROBERT A. GRANT

Robert A. Grant
U. S. District Judge

JUDGMENT ON DECISION BY THE COURT

UNITED STATES DISTRICT COURT
for the
NORTHERN DISTRICT OF INDIANA

Civil Action File No. S72-243

ALTA CHRAPLIWY, et al

vs.

UNIROYAL, INC., et al

JUDGMENT

This action came on for (hearing) before the Court, Honorable ROBERT A. GRANT, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that judgment be entered for petitioners in the amount of $833,679. Payment in the sum of $300,000 was made by defendant before judgment and the same is set off against the total amount of fees herein awarded the attorneys for the petitioners. Therefore, payment is due in the net amount of $533,679.

Dated at SOUTH BEND, INDIANA,
this 6th day of MARCH, 1981.

RICHARD E. TIMMONS
Clerk of Court

By TMISE M. HICKLE
Deputy Clerk

APPENDIX C

Opinion by Judge Fairchild

JUDGMENT—ORAL ARGUMENT
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

February 16, 1982

Before

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. THOMAS E. FAIRCHILD, Senior Circuit Judge
Hon. WESLEY E. BROWN, Senior District Judge*

ALTA CHRAPLIWY, et al., Plaintiffs-Appellants and Cross-Appellees, Nos. 81-1557 and 81-1633 vs. UNIROYAL, INC., a corporation, Defendant-Appellee and Cross-Appellant.	Appeals from the United States District Court for the Northern District of Indiana, South Bend Division. No. S72-C-0243 Judge Robert A. Grant

This cause was heard on the record from the United States District Court for the Northern District of Indiana, South Bend Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED in part, and REVERSED and REMANDED in part, with costs on appeal, including attorney's fees, allowed to appellants, in accordance with the opinion of this Court filed this date.

* Senior District Judge Wesley E. Brown of the District of Kansas sitting by designation.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

APRIL 13, 1982

Before

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. THOMAS E. FAIRCHILD, Senior Circuit Judge
Hon. WESLEY E. BROWN, Senior District Judge*

ALTA CHRAPLIWY, et al., Plaintiffs-Appellants and Cross-Appellees, Nos. 81-1557 and 81-1633 vs. UNIROYAL, INC., a corporation, Defendant-Appellee and Cross-Appellant.	Appeal from the United States District Court for the Northern District of Indiana, South Bend Division No. S72-C-0243 ROBERT A. GRANT, Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc*, all members of the original panel having voted to DENY rehearing, and no judge in regular active service having requested a vote on the *en banc* suggestion,

IT IS ORDERED that the petition for rehearing be, and the same is hereby, DENIED.

On March 1, 1982, plaintiffs filed a motion that we specify in our mandate that interest on the attorney's fees awarded shall accrue as of the date of the initial district court decision, March 6, 1981. Defendant has responded.

* Senior District Judge Wesley E. Brown of the District of Kansas is sitting by designation.

Plaintiffs correctly remind us that Rule 37, F.R.A.P. requires that our mandate contain instructions with respect to allowance of interest. This order will be included in our mandate.

Judgment was entered March 6, 1981 in the net amount of $533,679. It reflected three components: (a) an initial amount of $583,679 (of which $300,000 had been paid before entry of judgment), and, as we understand, $283,679 has been paid, with interest, pursuant to our order entered November 17, 1981); (b) a quality allowance of $200,000; and (c) a risk allowance of $50,000.

Our decision affirmed the $50,000 risk allowance, and interest should accrue on it from March 6, 1981 until paid.

Our decision required an increase in the initial amount to "close to the $1,510,768 for which plaintiffs contend, subject to minor adjustments" to be determined by the district court. We direct that interest on the initial amount as redetermined by the district court (after crediting amounts thereof already paid) shall begin to accrue as of 28 days after the date of this order (that being 21 days after the date our mandate will normally issue under Rule 41, F.R.A.P.).

Our decision left to the district court the question whether an adjustment is required in the $200,000 quality allowance and the amount of any such adjustment. We direct that interest on the quality allowance shall begin to accrue on the date of the new district court judgment determining that question.

We have considered *Harris* v. *Chicago Great Western Railway Co.*, 197 F.2d 829 (7th Cir. 1952), relied on by defendant. The facts are different and *Harris* does not require us to reach a different result.

Plaintiffs' motion is granted in part and denied in part, as herein set forth.